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Supreme Court, U.S.
FILED
07-226 JAN 29 2007
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

SERGIUS A. RINALDI,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DR. SERGIUS A. RINALDI
PETITIONER *PRO SE*
1811 LINDENWOOD AVENUE
EDWARDSVILLE, ILLINOIS 62025
(618) 656-3392

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QUESTIONS PRESENTED FOR REVIEW

Under the totality of the circumstances, a guilty plea is not voluntary "unless the defendant received 'real notice of the true nature of the charge against him,'" *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 2253, 2257, 49 L.Ed.2d 108 (1976), and "the defendant possesses an understanding of the law in relation to the facts," *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L.Ed.2d 274 (1969), substantive due process refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs, *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183, 72 S. Ct. 205 (1952).

1. The "presumption of innocence in favor of the accused is undoubted law, axiomatic and elementary, as such enforcement lies at the foundation of the administration of our criminal law system. To implement the presumption of innocence in favor of the accused, here, Petitioner, the question is whether the Court of Appeals for the Seventh Circuit must be alert to factors [conflicting and ambiguous rules, regulations and policies of Illinois Department of Public Aid (IDPA)] that may undermine the fairness of the fact-finding process when administering criminal justice? This Court should grant Petitioner's petition for writ of certiorari to bring uniformity to conflicting and ambiguous administrative rules, regulations and policies of IDPA. Orthodontics are most often billed by the case, in monthly installments over the course of treatment, Exhibit A, at 24.

2. In aid of *United States v. Liparota*, 471 U.S. 419, 85 L.Ed.2d 434,105 S. Ct. 2084 (1985), the Constitution does create "liberty interest," the question here is "may the Seventh Circuit Court find substantial evidence 'merely on the basis of evidence which in and of itself justified [the lower court's decision], without taking into account contradictory evidence and ambiguous policies from which conflicting inferences could be drawn,' to defuse Petitioner's assertion of actual and/or legal innocence." Fifth, Fourteenth

and Sixth Amendments to the Constitution, as such guarantee fair review.

3. Were both fines resulting from Petitioner's "Mail Fraud" crime, *United States v. Booker*, 543 U.S. at 264, 125 S. Ct. 738, 160 L.Ed. 2d 621 (2005)? For purposes of the "Sentencing Guidelines," reasonableness may be demonstrated by a court's consideration of the guidelines, relevant conduct, and statutory sentencing factors. *Blakely v. Washington*, 124 S. Ct. 2531 (2004) rendered Petitioner's sentence as a whole unconstitutional, where the "factors supporting the government's claim of the amount of fines was found by the judge utilizing the preponderance of the evidence standard." *United States v. Halper*, 490 U.S. 435, 104 L.Ed.2d 487, 109 S. Ct. 1892 (1989) held to violate double jeopardy where the amount of fine bears no rational relation to the government's loss. The statutes under Title 18 U.S.C. §1341 were not charged in the indictment as required by notice, and factors supporting upward departure, for the purpose of 18 U.S.C. §3571(b)(3), are solely the product of factors that undermine the fairness of the fact-finding process.

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Petitioner, Sergius A. Rinaldi, respectfully prays that a writ of certiorari issue to review the Published Order of the United States Court of Appeals for the Seventh Circuit issued on August 31, 2006, affirming the Petitioner's conviction and sentence. Rehearing *en banc* denied Nov. 6, 2006.

OPINION BELOW

The published order of the United States Court of Appeals for the Seventh Circuit, issued August 31, 2006, appears in Appendix A of this petition, *United States v. Rinaldi*, 461 F.3d 922 (7th Cir. 2006). The District Court's oral ruling appears in Appendix B of this petition.

JURISDICTION

1. The Central District of Illinois, (Springfield Division) originally had jurisdiction pursuant to 18 U.S.C. §3231, which provides exclusive jurisdiction of offenses against the United States.

2. Thereafter, the Petitioner timely appealed his conviction by plea of guilty and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

3. Petitioner seeks review in this Court of the judgment and order of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This cause presents questions under the Fifth, Fourteenth and Sixth Amendments of the federal Constitution. These constitutional questions are of serious important concerns that should be addressed by this Court to assure a uniform procedural process across the land regarding federal laws and administrative procedure policy interests.

STATEMENT OF THE CASE

A. Preliminary Inquiry:

The "Policies and Regulations" pursuant to Title 19 of the Social Security Act (SSA), was arbitrarily and capriciously interpreted by the United States Attorney's Office for the sole purpose of proof of Illinois Department of Public Aid (IDPA) billing system, which was formerly codified in Chapter 100 of the General Policy and Procedures (GPP). This medical assistance program is unlike the policy and procedures contained in the Chapter 200 Series Handbooks that applies to the specific type of service or type of billing practices for Dental and Orthodontic Services, in agreement with section 08670, which is now codified as "D8670." The law does not in any way authorize the government to substitute its own code construction of an administrative policy and regulations to justify its action. This case of Petitioner is not about desiring this Court's opinion on the subject, but with respect to law, what course of action (based on the offense conduct) should have been taken, whether it be judicial review rendered or administrative process?

In his motion to withdraw plea of guilty, at the lower court level and on appeal, Petitioner argued in pertinent part that he is actually innocent of fraudulent billing and that his conviction and sentence therefore violate the Fifth, Fourteenth and Sixth Amendments as guaranteed by the Constitution.

The importance of "Constitutional Protection" and the underlying prejudice to this Petitioner, is that the codified policies and regulations relating to the fraud offense upon which the conviction and sentence are to be based, as to the fraud count and particularly the amount of fine revenue involved, depended upon conflict and ambiguities in the regulations, policies and practices of IDPA billing, as was

interpreted by the government, which do not compart with the due process requirement of specificity performance. Rule 406 as in direct specific type of routine practice:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 406 of Fed. R. of Crim. Proc.

The District Court abused its discretion by refusing to allow Petitioner the withdrawal his plea under the rules of procedure. At the Appellate Court level, these factors viewed in combination with "inadequate "*de novo* review" require that this petitioner be allowed to withdraw his plea. Petitioner did assert his innocence at the time of his motion to withdraw plea and prior to sentencing proceeding.

STATEMENT OF FACTS

I. Facts of Criminal Offense

This case originated by way of a 13-Count Indictment filed against Petitioner on or about November 8, 2001; charging various crimes in violation of the United States Codes. Private attorneys were hired by Petitioner: Joel Hirschohorn, Hirschohorn & Bieber; Michael J. Costello, Costello Law Office and Joseph S. Miller at the plea to the charging counts. At his "withdrawal of plea and sentencing stages," Petitioner was represented by Thomas M. Dawson, Law Office of Thomas M. Dawson; and on appeal, again, private counsel Mr. Dawson entered his appearance. Petitioner entered into a plea agreement with the government on Counts 1 and 13 of the indictment, Count 1 charges Petitioner with mail fraud in violation of Title 18, United States Code, Section 1341 and Count 13 of the indictment charging Petitioner with obstruction of a federal health care

fraud investigation in violation of Title 18, United States Code, Section 1518.

In pleading guilty to Count 1, the petitioner admits that during the years 1994 through 2001, he was an orthodontist practicing from offices in Springfield and Edwardsville, Illinois. Among his clients were wards of the State of Illinois under the protection or custody of the Illinois Department of Children and Family Services (DCFS) as well as those receiving Medicaid assistance from the Illinois Department of Public Aid (IDPA). During this period of time, he would bill DCFS and Medicaid for services regarding these patients, which included monthly adjustments to braces. The Petitioner admits that he submitted bills to DCFS and IDPA for services he did not perform, including several of these monthly adjustments.

According to the government, on or about September 19, 2000, Petitioner knowingly used the United States mail to submit a claim to the Illinois Department of Public Aid for a monthly adjustment alleged to have been provided to a client identified as JB on August 9, 2000, when, in fact, the client was not in the State of Illinois at the time. The payment for this service, as well as others, according to the government, was made on or about September 19, 2000, by Doral Dental, on behalf of the Illinois Department of Public Aid, by check which was sent to the Petitioner through the mail.

As to Count 13, according to the government, Petitioner, in connection with the plea agreement, admits that he became aware that federal investigators were looking into his billing practices when he received a subpoena for records on or about January 23, 2001. He admits that on January 23, 2001, he removed certain documents from his offices. The government assumed that the documents were responsive to the subpoena, as such removal is an attempt to obstruct and prevent the communication of these documents to the investigators. Again, according to the government, Petitioner

on or about July 3, 2001, was seen removing a box of documents from his office in anticipation of a search by federal agents later that date.

Petitioner filed a motion to withdraw his plea of guilty on January 29, 2003, DKT. 61. Petitioner in this Motion asserted that after entering his plea of guilty he learned that the policies and regulations of IDPA supported his assertions that he was operating under a prorated fee system and not a fee for service. If prorated, then the factual basis to which the petitioner entered a plea of guilty was not a crime. Prorated would permit billing monthly even if the patient was not seen and would be consistent with the policies. Prior to the plea of guilty the petitioner was aware of the possible defense of "prorated vs. fee for service." However the defense was assured by the government that the dental clarification policy known as Bates 1026 had been disavowed; that the final word came from Steven Bradley, the head of the Bureau of Comprehensive Health Services for IDPA, DKT 61. The defense accepted the government's assertion but asked that they be advised if the fee for service position of the government was oral or in writing. In response, and after the entry of the plea, the government sent a June 21, 2002, letter to the Defense, DKT 61. In support of the fee for service position, the government attached to its letter Section 103 of the IDPA Handbook for Providers of Medical Services, which purported to exclude payment for unkept appointments.

Petitioner's position is that Section 103 applied to medical doctors and not "orthodontists"; that the rules and regulations allowed for payment for unkept appointments by "orthodontists"; that, in any event, the rules were too vague to support a criminal charge, and that Petitioner's assertion about rules as a prorated fee was reasonable. (See Exhibit A, 24 in direct support of this matter.) The District Court denied the Motion to withdraw the guilty plea without a hearing on

the subject on February 27, 2003, and Motion to Reconsider on August 23, 2005, and on December 9, 2004, based on its findings that the Provider's Handbook, Section 100 disallowed payments for missed visits; that document Bates stamped 1026 was the only evidence that the defense had substantiating Defendant's billing practices; and that 1026 had been disavowed. These findings are factually erroneous. See Appendix B, Opinions of the District Court.

II. Appellate Review

Petitioner Dr. Rinaldi challenged the District Court's rulings denying his request to withdraw the plea of guilty, as well as all fines imposed by the Court and the Court's use of sentencing factors not admitted by the petitioner himself, *United States v. Rinaldi*, 461 F.3d 922 (7th Cir. 2006). The Seventh Circuit upheld the District Court's rulings, *United States v. Rinaldi*, 461 F.3d at 922 (7th Cir. 2006). The Seventh Circuit acknowledged that being legally innocent of a crime, however, is a fair and just reason to withdraw a guilty plea, *United States v. Rinaldi*, 461 F.3d at 927 (7th Cir. 2006). Nevertheless, the Seventh Circuit "conceded that the District Court did not error in its evidentiary findings on either of Rinaldi's claims to demonstrate a fair and just reason to withdraw his guilty plea, citing *United States v. Mendoza*, 457 F.3d 726, 2006 WL 2290702, No. 05-3323. slip op. at 5 (7th Cir.), concluding that the Court did not abuse its discretion, Id. at 928 [8]. In reviewing the sentencing findings under this Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), the Seventh Circuit reviewed the District Court's sentencing decisions for unreasonableness, 543 U.S. at 264, 125 S. Ct. 738; *United States v. Wallace*, 2006 WL 2338021, No. 05-3675, slip op. at 4 (7th Cir. Aug. 14, 2006); *United States v. Arnaout*, 431 F.3d 994, 1003 (7th Cir. 2005); cited from *United States v. Rinaldi*, 461 F.3d at 929 [12-15] (7th Cir. 2006). Explaining that "Where the sentence falls outside

of the Guidelines range, however, it is incumbent upon the District Court to provide a sound justification according to the §3553(a) factors, citing *United States v. Dean*, 414 F.3d at 729 (7th Cir. 2005)." At sentencing, the District Court imposed a sentence of 21 months imprisonment in accordance with Petitioner's ability to pay a fine as set forth in the PSR, and then imposed the statutory maximum: fining Mr. Rinaldi $500,000; $250,000 per offense, *United States v. Rinaldi*, 461 F.3d at 930 [16, 17] (7th Cir. 2006), citing §3553(a), § 3553 (a) (6), §3553 (a) (2) (A) and (B). Id. at 931.

The Seventh Circuit found that "Because of this thorough analysis of the nature, circumstances, and seriousness of the offense in consideration of §3553 (a), we cannot say that the District Court's sentence was unreasonable," citing *United States v. Walker*, 447 F.3d 999, 1008 (7th Cir. 2006).

There is a conflict between the medical policy in §100 and the dental policies under §200 adopted by IDPA in the Carrier and Provider manuals. The analysis of the facts and evidence used to support the government's theory regarding IDPA policies and regulations, Section 100, and Dental policies and regulations, Section 200, was not adjudicated on its merits by the reviewing court, as was challenged in Ground 2 of Petitioner's appellate brief on appeal. The Court for the Seventh Circuit, as required by law, never resolved the ambiguous interpretation and conflict between the Medical policy in Section 100 and the Dental policies in Section 200, as was articulated by the government in Issue I on appeal and by the petitioner in Issue II on appeal.[1] The claim that the fee was a *pro rata* fee is a claim that negates the materiality element of the fraud charges, *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d (1999). But

[1] Continuation of Page 10, Brief of Plaintiff-Appellee on appeal, Issue I Id. At 26. Brief of Defendant-Appellant on appeal, Issue 2 Id. At 38.

for the error, a reasonable probability exists that "result of his actual innocence claim may and/or would have brought a different view on the subject."

The Seventh Circuit observed: "to allow a defendant to withdraw his plea of guilty based on a claim of legal innocence; the claim of legal innocence must be supported by "credible" evidence," *United States v. Rinaldi*, 461 F.3d at 926-928 [1-5, 8] (7th Cir. 2006). "Being legally innocent of a crime, however, is a fair and just reason to withdraw a guilty plea."

As Section 200 supports, the standard practice of Orthodontist billing is as a *pro rata* system.[2] Other insurance and government payment systems treat Orthodontics as a *pro rata* system. An interpretation of regulations based on similar billing systems is not unreasonable. Petitioner's understanding and interpretation of the "Medicaid/Dental policies and regulations applicable to Orthodontics, Section 200 rather than Section 100 billing system, is consistent with many other experts in the field and therefore warranted a reasonable factual finding on the issue at hand, as raised in Petitioner's appellate brief on appeal." This the Seventh Circuit Court did not do, *United States v. Rinaldi*, 461 F.3d at 926-928 [1-8] (7th Cir. 2006). See Rule 406 of Fed. R. Crim. Proc.

As evident by law in general, the "case or controversy requirement" is of special importance in cases where this Court is being asked to review the legality of a sentence in accordance with existing case law, *United States v. Halper*, 490 U.S., 435, 104 L.Ed.2d 487,109 S. Ct. 1892 (1989); and also post *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005). Imposing a maximum fine of $500,000 for both counts is unreasonable, as such factual

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[2] Access to Dental Care for Low-Income Children in Illinois Exhibit A, Id. At 24.

finding by the judge rather than a jury was in error, *Blakely v. Washington*, 542 U.S. 296 (2004). Remand is warranted in this case. See *United States v. Rinaldi*, 461 F.3d 922 (7th Cir. 2006).

Rehearing and suggestion rehearing *en banc* was denied November 6, 2006. Hon. William J. Bauer, Circuit Judge, Hon. Frank H. Easterbrook, Circuit Judge, Hon. Diane P. Wood, Circuit Judge, for the Seventh Circuit Court of Appeals No. 01-CR-30110. *United States v. Rinaldi*, no citation published.

REASONS FOR GRANTING THE WRIT

In accordance with requirements of the Fifth, Fourteenth and Sixth Amendments regarding the scope and discretions of federal government's procedural process and [administrative] agency's (IDPA) [construction of its policies and regulations which it administers], *United States v. Liparota*, 471 U.S. 419, 85 L.Ed.2d 434, 105 S. Ct. 2084 (1985). The Constitution does create "liberty interests," *Collins v. City of Harker Heights*, 503 U.S. 115, 126, 112 S. Ct. 1061, 1069, 117 L.Ed.2d 261 (1992), upon which there is a conflict and substantial controversy, *State of New York v. Bankers Life* and *Casualty et al.*, 404 U.S. 6, 30 L. Ed.2d 128,92 S. Ct. 165 (1971). Supreme Court Rule 10. *Singleton v. Wulff, Jr., et al.*, 428 US 106, 121, 96 S. Ct. 2868, 49 L.Ed.2d 826 (1976). An error of law is, however, an abuse of discretion. *Rochin v. California*, 342 US 165, 96 L.Ed.183, 72 S. Ct. 205 (1952). (Substantive due process refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs). The general criteria for granting *certiorari* of a Court of Appeals decision "has been met."

First, plea agreements are construed according to standard principles of contract law; however, because the agreement itself implicates Petitioner's constitutional rights,

McCarthy v. United States, 394 U.S. 459,466, 89 S. Ct. 1166, 1171 (1969), the analysis used by the Appellate Court, is a fact-finding process in assessing whether Petitioner has demonstrated a fair and just reason to withdraw plea of guilty, *United States v. Rinaldi*, 461 F.3d 922 (7th Cir. 2006). The ability of an appellate court to find substantial evidence "merely on the basis of evidence which in and of itself justified [the lower court's decision], id. at 927-928 [1-8], without taking into account contradictory evidence or ambiguous facts from which conflicting inferences could be drawn, absent addressing Issue 2 in Petitioner's Appellate Brief regarding 'IDPA's policies statement and regulations as to Orthodontists' procedural billing process, here, Section 200,'" is a substantial question that can be analyzed under the federal Constitution, to determine whether or not the Appellate Court was right in its fact-finding analysis in coming to the term that Petitioner has not made the necessary fair and just reason that would allow the District Court to withdraw plea of guilty, see Petitioner's Appellate Brief at 38 Issue 2 as Exhibit B.

If however, [administrative agency's policies statement and regulations] is shown to be "ambiguous" and the administrative agency's history does not answer the precise question at issue, the reviewing court must defer to the administrative agency's interpretation to resolve on appeal the facts of Petitioner's case. Accordingly, the *United States v. Bradley*, 381 F. 3d 641, 645 (7th Cir. 2004) decision, as well as the decision in *United States v. Mendoza*, 457 F.3d 726, 2006 WL 2290702, No. 05-3323. slip op. at 5 (7th Cir. Aug. 10, 2006), make it clear that the court for the Seventh Circuit decision in *United States v. Rinaldi*, 461 F.3d 922 is subject to *de novo* review as to IDPA's policies statement and regulations, *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983). An analysis on this subject is warranted,

so that the Seventh Circuit justice could resolve the administrative policies, practices and regulations of IDPA's ambiguous rules at hand as written, *McCarthy v. Madigan*, 503 US 140, 144, 112 S. Ct. 1081, 1086, 117 L.Ed.2d 108, 96 S. Ct. 2253 (1976). In accordance with this Court's precedent, errors within the Court of Appeals fact-finding process and avoiding public interest in justice are compelling reasons to grant this writ.

Second, the Seventh Circuit Court's decision regarding the District Court's fact-finding process at sentencing can be analyzed under the Constitution, *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385,111 S. Ct. 1854 (1991), and is a substantial question under the Constitution relevant to the Fifth, Eighth and Sixth Amendments. The Seventh Circuit decisions in *United States v. Olson*, 450 F.3d 655, 683-84 (7th Cir. 2006) and *United States v. Walker*, 447 F.3d 999 at 1008 (7th Cir. 2006) are misplaced as to aggravating factors that are subject to analysis under Constitutional law. In this recent Court's decision, *Cunningham v. California*, (No. 05-6551), as well as the decisions in *Blakely v. Washington* and *United States v. Booker*,[3] make it clear that a sentence is illegal "when it is not authorized by law, see *United States v. Rinaldi*, 461 F.3d at 930-932[17] (7th Cir. 2006)," where amount of fine bears no rational relation to government's loss, *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989).

For these reasons, review by this Court is appropriate.

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[3] *Blakely v. Washington*, 542 U.S. 296, and *United States v. Booker*, 543 U.S. 220 bear most closely on the question presented to this Court.

A. THE CRIME AND CONSTITUTIONAL PROVISIONS: ASSERTION OF ACTUAL INNOCENCE

When it comes to plea agreements, it is fundamental, and firmly established by this Court's precedents, *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712,23 L.Ed.2d 274 (1969), "that a guilty plea is not voluntary "unless the defendant received 'real notice of the true nature of the charge against him,'" *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 2253, 2257, 49 L.Ed.2d 108 (1976) and "the defendant possess a clear understanding of the law in relation to the facts," *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 1171 (1969).

Federal law prohibits the use of the mails in furtherance of a scheme to defraud, 18 U.S.C. §1341. To prove mail fraud, the government was required to show that the accused (1) intentionally participated in a scheme or artifice to defraud and (2) used the United States mails to carry out that scheme or artifice. *United States v. Schmuck*, 489 U.S. 705, 710, 109 S. Ct. 1443, 1447, 103 L.Ed.2d 734 (1989). The material facts as to the elements of the crime are not being disputed. In the case of Petitioner, the allegation and the basis on which this case was tried was under the theory of an individual business rather than a corporation, see Exhibit C and see also DKT within the same Exhibit C, *Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The focal point for this Court's review should be the administrative record already in existence, *United States v. Liparota*, 471 U.S. 419, 85 L.Ed.2d 434, 105 S. Ct. 2084 (1985), not some new record made within a Judicial Article III Court, *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984).

1. Petitioner has been in dental services well over twenty (20) years. During the years 1994 through 2001, he was an "Orthodontist" practicing from offices in Springfield and

Edwardsville, Illinois. Among his clients were wards of the State of Illinois under the protection or custody of the Illinois Department of Children and Family Services (DCFS) as well as those receiving Medicaid assistance from the Illinois Department of Public Aid (IDPA). During this period of time (the years 1994 through 2001), he would bill DCFS and IDPA for services regarding these patients, which included monthly adjustments to braces.

2. After indictment the petitioner entered a plea of guilty, upon advice of his counsel, on March 5, 2002, to Counts 1 and 13. The indictment charged 13 counts, all violations against the United States Codes, on November 8, 2001.[4]

> Count 1 charges the petitioner with mail fraud in violation of Title 18, United States Code, §1341 and Count 13 of the indictment charges the Petitioner with obstruction of a federal health care fraud investigation in violation of Title 18, United States Code, §1518.[5]

3. With respect to Count 1, Title Penalties: for such violation, up to 5 years of imprisonment, up to a $250,000 fine, up to 3 years of supervised release, a $100 mandatory special assessment, and restitution to the victim (s) of the offense. With respect to Count 13, Title Penalties: for such violation, up to 5 years of imprisonment, up to a $250,000 fine, up to 3 years of supervised release, and a $100 mandatory special assessment. The District Court sentenced Petitioner to 21 months with respect to both counts as a whole, 3 years supervised release, $200 special assessment, restitution $25,844.35, and a fine of $500,000, based on conviction as charged in Counts 1 and 13 of the indictment.

4. In accepting the guilty plea, the District Court found that there was sufficient factual basis for such plea. This

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[4] Petitioner initially pleaded not guilty to all of the Counts as charged in the indictment.

[5] The material facts in Count 13 are not being disputed.

factual basis was based on conflicting and ambiguous language within the IDPA's policy statements and regulations. A criminal statute or regulation, must, if it is to comport with the requirements of due process, give fair notice of its prohibitation to those persons potentially subject to it. See *United States v. Groll*, 992 F.2d 755, 758 (7th Cir. 1993), "Being legally innocent of a crime, however, is a fair and just reason to withdraw a guilty plea." Once his plea was accepted by the Court, see *United States v. Rinaldi*, 461 F.3d 922, 926-928 [1-8], withdrawal was available only upon his showing a "fair and just reason" to do so, citing Fed. R. Crim. P. 11 (d)(2)(B). The claim must be supported by credible evidence, *United States v. Gomez-Orozco*, 188 F.3d 422, 425 (7th Cir. 1999).

5. In *United States v. Gomez-Orozco*, the Seventh Circuit did not require that the defendant prove himself innocent in order to meet the "fair and just" element of Fed. R. Cr. Pro. 32(e). The Court required that a person attempting to withdraw a plea, before sentencing, present "credible evidence" of actual innocence. The *United States v. Gomez-Orozco* Court noted that defendant had presented substantial, though disputed, evidence that his "parents were married under the common law of Texas" and further concluded that the defendant had presented "enough evidence" to withdraw his guilty plea. In *United States v. Gomez-Orozco* the "substantial" credible evidence in dispute involved two family affidavits and a travel document. The Seventh Circuit found it was "possible" that a jury might find reasonable doubt about his alienage. Id. at 425-427 [1-12].

6. Petitioner, like *United States v. Gomez-Orozco*, presented "credible evidence" (1) in the form of affidavit from an investigator named Deb McGregor, dated April 8, 2005, at this interview with David Spinner, Manager of Dental Programs for IDPA in March 2000, advised §100 only goes to medical providers and maxillofacial (oral)

surgeons for surgical procedures, stating that there is no reason that a dentist or orthodontist gets the medical manual; otherwise, both 100 and 200 are separate manuals, not bound together,[6] (2) additionally, the report Access to Dental Care for Low-Income Children in Illinois, which indicates installment billing for orthodontics, was developed with and approved by a large Dental Advisory Group[7] including Ann Lattig, Senior Public Service Administrator, Bureau of Comprehensive Health Services, Illinois Dept. of Public Aid; Henry Lotsof, DDS, Vice President, Doral Dental Services of Illinois; Matt Powers, Administrator, Division of Medical Programs, Illinois Dept. of Public Aid; Steve Geiermann, DDS, Regional Dental Consultant, Bureau of Primary Health Care, Health Resources and Services Administration; Dave Spinner, Medical Assistance Dental Program, IDPA; and Lewis Lampiris, DDS, MPH, Chief, Division of Oral Health, IDPA; (3) Section 200 was not provided to the defense as a basis to support the plea until after the plea was entered, and (4) Petitioner proved that the government's theory was conflicting and ambiguous when interpreting the regulations, policies and practices of IDPA billing, as such procedural process did not comport with due process requirement of specificity and therefore cannot support a criminal conviction in this case, Exhibit D. Petitioner presented a fair and just reason for withdrawal and setting aside plea, so that Petitioner could exercise his rights as the Fifth, Fourteenth and Sixth Amendments of the Constitution guarantee, *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L.Ed.2d 935 (1974), "The touchstone of due process is protection of the individual against arbitrary action of government."

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[6] The Policies and Regulations as to §100 and §200 do not authorize the government to substitute its own construction of Policies and Regulations as administered by IDPA.

[7] Access to Dental Care for Low-Income Children in Illinois (2000). Exhibit A. Id. At 53-54.

The Seventh Circuit never addressed Issue 2 (Exhibit B) in whole *de novo* review as required under the fact-finding standard, *United States v. Anderson*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). A remand is necessary to determine the merits of Issue 2, IDPA's policies and regulations on its facts, as a matter of law. *De novo* review is requested.

B. WHEN A JUDGE INFLICTS PUNISHMENT THAT THE PLEA AGREEMENT ALONE DOES NOT ALLOW, "THE PLEA HAS NOT STATED ALL THE FACTS WHICH THE LAW MAKES ESSENTIAL TO THE PUNISHMENT," *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Halper*, 490 U.S. 435, 487, 109 S. Ct. 1892 (1989); 104 L.Ed.2d

In the case of Petitioner, the District Court imposed a fine in the sum of $500,000 when the guideline fine was $4,000–$40,000, the District Court made factual determinations that directly increased Petitioner's fine beyond that required by the presumptive range of punishment for the offenses of conviction, *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). These facts were not charged in the indictment, tried to a jury or by plea, or admitted by Petitioner, *United States v. Rinaldi*, 461 F.3d at 929-932 [12-17] (2006).

In *United States v. Booker*, this Court held that its *Blakely v. Washington* decision applies to the "Sentencing Guidelines" and, as a result, the guidelines – mandatory under the Sentencing Reform Act (SRA) – violate the Sixth Amendment, Id. at 750. As its remedy, this Court adopted an approach which "(through severance and excision of two provisions) make[s] the Guidelines system advisory while maintaining a strong connection between the sentence

imposed and the offender's real conduct," Id. at 757, *United States v. Rinaldi*, 461 F.3d at 930-932 [16-17] (2006).

Blakely v. Washington applies to Petitioner's case, as this Court held: "[W]e must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review."

Other than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum had to be submitted to a jury, and proved beyond a reasonable doubt, this design by insuring that a judge's authority to sentence derived wholly from a jury's verdict, in this case of petitioner, conviction by plea of the facts admitted by the petitioner, Id. at 159 L.Ed.2d 403, 124 S. Ct. 2531 (2004).

Petitioner entered into a plea of guilty with the government on Counts 1 and 13 of a 13-Count Indictment. For a violation of Count 1, mail fraud under Title 18 U.S.C. §1341, up to 5 years of imprisonment, up to a $250,000 fine, up to 3 years of supervised release, a $100 mandatory special assessment, and restitution to the victim(s) of the offense; Count 13, obstruction of a health care fraud investigation under Title 18 U.S.C. §1518, up to 5 years of imprisonment, up to a $250,000 fine, up to 3 years of supervised release, and a $100 mandatory special assessment.

The Seventh Circuit noted that for Petitioner's offense level of 14, the suggested "Guidelines fine" is $4,000–$40,000, citing U.S.S.G. §5E1.2(c)(3). The statutory maximum amount is limited to no more than $250,000 per offense for individuals, citing 18 U.S.C. §3571 (b)(3). At sentencing, the District Court properly calculated the Guidelines fine, reviewed the defendant's ability to pay as set forth in the PSR, and then imposed the statutory maximum, fining Rinaldi $250,000 per offense, *United States v. Rinaldi*, 461 F.3d at 930 [17].

In examining the value of the fine, the Seventh Circuit reviewed the District Court's decision to impose the statutory maximum for reasonableness, citing *United States v. Booker*, 543 U.S. at 264, 125 S. Ct. 738; citing also *United States v. Arnaout*, 431 F.3d at 1003. As with all sentences outside of the suggested Guidelines range, the Seventh Circuit looked to see if the District Court had given them an adequate explanation for its divergence. In doing so, the Seventh Circuit considered all of the District Court's reasons, oral and written alike, citing *United States v. Wallace*, 2006 WL 2338021 at 12. As noted by the Seventh Circuit, "because the fine imposed was more than twelve times the Guidelines suggestion," however, the District Court's reasons must be particularly compelling, citing *United States v. Jordan*, 435 F.3d 693, 697 (7th Cir. 2006), (affirming District Court's imposition of statutory maximum sentence 103 months above the Guidelines' range), *United States v. Rinaldi*, 461 F.3d at 931 [17] (7th Cir. 2006).

Under the plain error doctrine, *United States v. Booker*, 125 S. Ct. at 769. Petitioner must show "(1) 'error,' (2) that is 'plain' [and] (3) that 'affects substantial rights.' *Johnson v. United States*, 520 U.S. 461, 467 (1997)," [quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)]. If those factors are satisfied, this Court in its discretion may correct error (4) that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. at 732.

Petitioner' s sentence was based on facts not found by the jury beyond a reasonable doubt, but was determined by a judge's factfinding process, which is "in clear violation of *Blakely v. Washington* and *United States v. Booker* errors of law," *United States v. Rinaldi*, 461 F.3d at 931 [17] (7th Cir. 2006).

Under such analysis, Judge Mills gave the following statements when considering the mandate of §3553(a) at sentencing:

> [T]he Court does feel that Dr. Rinaldi has committed a terrible crime against the people of Illinois, not heinous, not involving physical touching or injury, but he has bilked the taxpayers out of a tremendous amount of money. And we will never know the exact amount of that.

United States v. Rinaldi, 461 F.3d at 931 [17]. Further, he specifically noted that:

> [h]e's no better than a highwayman that pulls his pistols and [says] stand and deliver. And he has taken the taxpayers of Illinois and taxpayers of the United States right down the pea patch. I don't know the exact amount [of his fraud], none of us do. But we know that he's well-to-do, he's been eminently successful in his practice. His net worth stands at $2,340,200. Id. at 931 [17].

Id. At 931 [17]

As noted, the District judge expressed his concern "whether the sentence that I'm going to give will be a deterrence adequate enough." In the court's subsequent written opinion, it again recited the Guidelines suggested fine, and concluded that, pursuant to §3553(a) (6), "that a fine within that range would not adequately reflect the seriousness of the offense or provide just punishment for the offense," *United States v. Rinaldi*, 461 F.3d at 931 [17]. This statement also strikes at the heart of §3553(a)(2)(A) and (B) and dovetails neatly with the Court's characterization of Rinaldi's crimes.

Ultimately, the District Court's statements evidenced its open concern for the magnitude of Rinaldi's fraud, the difficulty encountered in ascertaining the full extent of

the impact – the fault for which lay with the defendant's admitted obstruction of justice – and the possibility that Rinaldi may have benefited from that obstruction. According to the Seventh Circuit, "The Guidelines range," Judge Mills repeatedly noted, simply did not reflect the degree of harm the defendant had caused. But the Court distinguished the impact of Rinaldi's crime as one of nonviolence and chose not to increase his term of imprisonment, but opted instead to increase the fine; punishing the perpetrator with a correlate of his own crime. Because of this thorough analysis of the nature, circumstances, and seriousness of the offense in consideration of §3553(a), we cannot say that the District Court's sentence was unreasonable, citing *United States v. Walker*, 447 F.3d 999, 1008 (7th Cir. 2006).

This Court in *Blakely v. Washington* held that the defendant's Sixth Amendment right to trial by jury was violated when the trial court sentenced the defendant above the maximum of the standard range for his offense, on the basis of the sentencing court's finding that the defendant acted with deliberate cruelty. This Court held unconstitutional the *Washington* court's enhancement of the defendant's sentence based on facts not admitted by the defendant, or tried to a jury, in the case of Rinaldi, the plainly stated conclusion of the Constitution's Sixth Amendment was that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment," *United States v. Rinaldi*, 461 F.3d at 931 [17] (7th Cir. 2006).

In this Court's opinion, authored by Justice Scalia, the Court set forth, "'[S]tatutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." As this Court in *Blakely v. Washington* makes clear, the "statutory maximum" is the

guideline range of punishment before any sentencing enhancements are applied.

Here, for Petitioner's offense level of 14, the Guidelines fine range is $4,000–$40,000, U.S.S.G. §5E1.2(c)(3). While the Statutory maximum amount is limited to no more than $250,000 per offense for individuals, 18 U.S.C. §3571 (b)(3). The District Court calculated the Guidelines fine, reviewed the Petitioner's ability to pay as set forth in the PSR, and then imposed the statutory maximum, fining Petitioner $500,000; $250,000 per offense. These fines in Counts 1 and 13 are in violation of both *Blakely v. Washington* and *United States v. Booker* errors of law.

The District Court sentenced Petitioner under the Guidelines, 21 months term of imprisonment, Id. at 930 [16], but opted instead to increase the fine under the statutory maximum of $500,000; $250,000 per offense, rather than $4,000–$40,000 under the Guideline fining provision, Id. at 930-931 [16-17].

The aggravated factors used to increase Petitioner's fine above the Guideline range were based upon facts found and determined by the sentencing court, not by guilty plea, thereby depriving Petitioner of a right as guaranteed under the Fifth and Sixth Amendments of the Constitution, *Blakely v. Washington* 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005), as such error was prejudicial to Petitioner's interest to fundamental fairness and equal protection clauses, where amount of fine bears no rational relation to government's loss. *Braxton v. United States*, 500 U.S. 344, 114 L.Ed.2d 385, 111 S. Ct. 1854 (1991). A remand is necessary.

CONCLUSION

The District Court erred, the Appellate Court for the Seventh Circuit misapplied the law of *Blakely v. Washington* and *United States v. Booker* to the facts of this sentencing

process. Failure to evaluate the seriousness of claim raised under Ground 2 of Petitioner's brief on appeal, IDPA Policies and Regulations, as such errors affected Petitioner's right to due process, as such failure affected the fairness, integrity and public reputation of the District Court proceedings.

Petitioner seeks reversal, or in the alternative, a new proceeding by trial rather than plea and/or a new sentencing hearing.

Respectfully submitted,

Dr. Sergius A. Rinaldi
Pro se
1811 Lindenwood Avenue
Edwardsville, IL 62025
(618) 656-3392

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-4113

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SERGIUS RINALDI,

Defendant-Appellant

Appeal from the United States District Court
For the Central District of Illinois.
No. 01 CR 30110—**Richard Mills**, *Judge.*

ARGUED APRIL 3. 2006-DECIDED AUGUST 31,2006

Before BAUER, EASTERBROOK, and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* After protracted proceedings before the district court, Sergius A Rinaldi pleaded guilty to the charges of mail fraud, 18 U.S.C. §1341, and obstruction of justice, 18 U.S.C. §1518. The plea was accepted by the court, and judgement was entered on March 25, 2002. Before sentencing, Rinaldi moved to withdraw the plea based upon claims of actual innocence. He argued, in part, that his behavior was the result of Adult Attention Deficit Disorder, and that the disorder, which was diagnosed after he entered his plea, negated his capacity to form the requisite *mens rea* for the crimes. The district court denied his motion and sentenced him to 21 months' imprisonment and a fine of $500,000. Rinaldi appeals the denial of his motion to withdraw the guilty plea, his sentence and fine, and other procedural matters before the district court. We affirm.

Rinaldi's case is not new to this Court. During the course of the legal proceedings against him we have heard two interlocutory appeals through which we had the opportunity

to establish the history of the matter. *See In re Grand Jury Proceedings,* 280 F.3d 1103 (7th Cir. *2002); United States v. Rinaldi,* 351 F.3d 285 (7th Cir. 2003). In the interest of efficiency, we relate only those facts relevant to the instant appeal.

I. Background

Sergius A. Rinaldi, D.M.D., is an orthodontist with offices in Edwardsville and Springfield, Illinois. Part of his practice involved the treatment of wards of the state of Illinois, who were under the protection of the Illinois Department of Children and Family Services (DCFS), and individuals who received Medicaid assistance through the Illinois Department of Public Aid (IDPA). From 1991 to 2001, Rinaldi submitted claims for payment to these two departments; some of these claims were for services not rendered.

In January 2001, Rinaldi received a grand jury subpoena demanding the production of records pertaining to these billings. The subpoena covered his original case files and forms for certain patients, appointment books and logs, patient sign-in sheets, and records of cancellation. These records were never produced. At a contempt hearing on the matter, the government presented evidence that Rinaldi had concealed the files and documents after receiving the subpoena. The district court held Rinaldi in contempt and ordered him to be imprisoned and fined until the material was produced. We affirmed this decision in *In re Grand Jury Proceedings,* 280 F.3d 1103 (7th Cir. 2002). On November 8. 2001, Rinaldi was indicted for executing a scheme to defraud the Medicaid system in the state of Illinois and obstructing justice.

In late February 2002, with the aid of counsel, Rinaldi negotiated with the government and pleaded guilty to one count of fraud and one count of obstructing justice. The district court conducted a full Rule 11 hearing and entered

judgment on March 25, 2002. The sentencing hearing was initially scheduled for the following June 24, but was repeatedly deferred at the request of both parties.

On January 29, 2003, Rinaldi moved to withdraw his guilty plea based upon a two-prong claim of actual innocence. Primarily, he argued that he had recently discovered that he submitted invoices using a "bundled fee", not a "fee for services," system. The bundled fee system would have allowed him to bill a flat rate for a package of services regardless of whether they were actually performed. Alternatively, he claimed that any mistakes he made in record-keeping and billing were the result of his newly diagnosed, but pre-existing, DSM IV condition of Adult Attention Deficit Disorder (AADD), not criminal intent. The district court denied his motion, holding that both of these claims were available prior to his having entered his plea, and that they ran contrary to his testimonial admission of guilt at the plea colloquy.

The defense moved to have the district court reconsider the denial of his motion to withdraw the guilty plea. In his motion, Rinaldi argued that prior to pleading guilty he believed he properly billed Medicaid under the bundled fee system. He submitted that the government misrepresented that the billing procedure was illegal, and promised. but failed, to provide legal support for this argument. It was only after the government's failure to produce the supporting law that he learned IDPA paid for services with the bundled-fee agreement. While this motion was pending, the district court ordered Rinaldi to undergo a custodial psychological exam to test the veracity of his AADD claim. The defendant filed an interlocutory appeal protesting the custodial exam, and we reversed the order. *United States v. Rinaldi,* 351 F.3d 285 (7th Cir. 2003). On remand, the district court appointed Dr. Sue Moriearty, Ph.D., ABPP, to conduct a non-custodial examination. Additionally, Dr. Phillip E. Bornstein, M.D.,

FAPA, and his assistant, Helen P. Appleton, Ph.D., were hired as experts for the government. In their reports submitted to the court, all three doctors concluded that Rinaldi had the mental capacity to form the requisite intent to submit fraudulent bills and obstruct justice.

The defendant submitted reports from Robert Chapman, M.D., and George Athey, Jr., Ph.D., ABPP, a clinical psychologist and neuropsychologist. Dr. Chapman diagnosed Rinaldi with AADD and opined that the condition would diminish his capacity to form the requisite criminal intent. Dr. Athey reported that, in his opinion, Rinaldi was incapable of forming the intent necessary to carry out the crimes as charged. After reviewing the reports and the entirety of the record, the district court denied Rinaldi's motion to reconsider. Judge Mills held that even the presence of the AADD symptoms did not preclude Rinaldi's capacity to form the requisite *mens rea. United States v. Rinaldi,* 347 F.Supp.2d 594, 600 (C.D. Ill. 2004). Regarding the bundled-fee system, the court further held that the IDPA did not allow this invoice method and that any evidence or argument regarding the claim was available to Rinaldi contemporaneous with his plea; thus it was not new evidence warranting a withdrawal of the plea. *Id* at 604. Rinaldi filed a subsequent motion to reconsider the denial of his motion to reconsider. This, too, was denied. The district court set the sentencing hearing for April 25 2005.

Following the denial of his motions to reconsider, Rinaldi filed three successive motions to continue the sentencing hearing. In May 2005, he argued that he needed six additional months to conduct a statistical analysis of the impact of his fraud. The methodology for this analysis consisted of tracking down and interviewing the defendant's former patients about their past appointments and treatments. Because of a delay in obtaining the necessary contact information from the IDPA, the district court

granted a three month extension, but stated that it would be the final continuance. Six months, the court warned, was "too long." Order 4, (May 25,2005) (No. 144). Nevertheless, at the end of July, the defendant requested an additional three months to continue working on his statistical analysis and to ensure the availability of crucial witnesses. The district court granted Rinaldi the time necessary only to secure the attendance of his expert witnesses. The sentencing hearing was finally held over the course of three days on October 14, 17, and 18, 2005.

Prior to the hearing, both parties filed sentencing memoranda. Rinaldi objected to the calculation of loss, certain facts regarding his offense conduct, and his criminal intent as described in the pre-sentence investigation report (PSR). He also moved for a downward departure based upon his claim of diminished capacity. The government moved for an upward departure, arguing that any difficulty in calculating the loss caused by Rinaldi's scheme was the result of his own obstruction of justice.

At the hearing, both parties re-presented their evidence submitted in consideration of the motion to reconsider Rinaldi's motion to withdraw his guilty plea. Doctors Athey and Chapman testified for the defendant consistent with their previously flied reports. Dr. Chapman, however, acknowledged under questioning that if the evidence of defendant's conduct was as the government described, it would show "intentional conduct" requiring some "executive function" and "decision-making," and that to carry out the fraud for multiple patients, as Rinaldi did, would be "an intentional act." Sentencing Hr'g Tr., Vol. I at 122-25. Oct. 14, 2005.

The government presented testimony from Rinaldi's former employees and their medical experts. The employees detailed Rinaldi's specific fraudulent conduct in billing for

services not rendered and his having removed records from his office after receiving the government subpoena. Dr. Bornstein testified that Rinaldi's consistent alteration of one patient's records reflected a "systematic, calculated behavior." Sentencing Hr'g Tr., Vol. II at 450. Oct. 17,2005. He further opined that based upon prior testimony introduced at the hearing, and his personal evaluation of the defendant, Rinaldi had both the capacity to form the requisite *mens rea,* and to conform his actions to the demands of the law. Finally, the court heard the testimony of Susan K Jackson, an auditor for the Illinois State Police Medicaid Fraud unit, who summarized the evidence supporting the loss calculation in the PSR.

When calculating Rinaldi's sentence, the district court adopted the recommendations of the PSR and found an offense level of 14, criminal history category of I; yielding a Guideline range of 15 - 21 months. After examining the factors presented in 18 D.S.C. §3553(a), the court rejected both parties' requests for "departures," and sentenced Rinaldi to 21 months' imprisonment and a fine of$500.000, $250,000 per count.

On appeal Rinaldi claims the court erred in (1) denying his motion to withdraw his guilty plea, (2) denying his motion for continuance to determine the impact of his fraudulent scheme, and (3) the reasonableness of his sentence. We address these claims in sequence.

II. Analysis

A. The Motion to Withdraw His Guilty Plea

Rinaldi submits that because he presented evidence of his actual innocence, the district court erred in denying his motion to withdraw the guilty plea. The right to withdraw a guilty plea is not absolute. *United States v. Bradley,* 381 F.3d 641, 645 (7th Cir. 2004). Once his plea was accepted by the court, withdrawal was available only upon his

showing a "fair and just reason" to do so. FED. R. CRIM. P. 11 (d) (2) (B); see also *United States V. Bennett,* 332 F.3d 1094, 1099 (7th Cir. 2003). This is no mean feat. Guilty pleas are not to be treated as a strategic maneuver by the parties, and we presume the verity of the defendant's statements made at a Rule 11 colloquy. *United States v. Silva,* 122 F.3ct 412,415-16 (7th Cir. 1997); *United States U. Messina,* 55 F.3d 1241, 1248 (7th Cir. 1995). Being legally innocent of a crime, however, is a fair and just reason to withdraw a guilty plea. *United States V. Groll,* 992 F.2d 755, 758 (7th Cir. 1993). We review the district court's factual findings as to whether the defendant presented a "fair and just reason" for clear error. *Bradley.* 381 F.3d at 645. The district court's overall decision on Rinaldi's motion to withdraw the guilty plea is reviewed for an abuse of discretion. *Id.* at 644.

In examining a motion to withdraw a guilty plea, the district court has three options: it can permit the withdrawal of the plea, conduct an evidentiary hearing, or deny the motion with an explanation as to why the evidence is insufficient or incredible. *Silva,* 122 F.3d at 415. The district court below considered substantial evidence from both parties when hearing Rinaldi's motion to reconsider the court's denial of his motion to withdraw the guilty plea. Judge Mills's opinion on the matter reviewed the medical reports and testimony of Dr. Chapman and Dr. Athey for the defendant, and Dr. Moriearty and Dr. Bornstein for the government. Dr. Chapman diagnosed Rinaldi with AADD, but noted that the defendant's limitations stemming from the diagnosis "did not rise to the level of incompetence to plead, stand trial, or proceed." *Rinaldi,* 347 F.Supp.2d at 598. Further, Dr. Chapman acknowledged that there was no clinical evidence indicating that Rinaldi was incapable of forming the requisite *mens rea* during the relevant period.

The district court then compared this testimony to that of

Dr. Moriearty and Dr. Bornstein, neither of whom diagnosed Rinaldi with AADD. Dr. Moriearty specifically opined that even if the defendant's symptoms were such as he presented or exaggerated in her examination, they would not render him incompetent to form the specific intent necessary to commit the crimes as charged. Dr. Bornstein had a similar conclusion. He found that, while Rinaldi did have a narcissistic personality disorder, the defendant presented no mental defect that would prevent him from possessing the necessary *mens rea* for the crime, or to be capable of assisting his attorney in the plea negotiations or entering the plea itself. Additionally, Dr. Bornstein observed that during the period in which Rinaldi alleged a diminished mental capacity from AADD, he was able to build and maintain a successful dental practice with offices in two separate cities. In Dr. Bornstein's final opinion, Rinaldi's intellectual capacity was not diminished, but was instead above average.

Following this detailed review of the medical evaluations submitted by both parties, the district court concluded that "the Defendant's AADD diagnosis did not prevent him from forming criminal intent. Accordingly, he has not presented a claim of actual innocence as to that issue." *Rinaldi,* 347 F.Supp.2d at 600. In making this finding, the district court explicitly agreed with the testimony of Dr. Moriearty and Dr. Bornstein, explaining that it was particularly persuaded by Rinaldi's ability to carry on his successful practice during the same period he claimed to be of such a diminished mental capacity. Further, the district court later reconsidered the entirety of this information at the three-day sentencing hearing, and again rejected Rinaldi's claims of diminished capacity. Given the weight of the evidence from the medical experts, we cannot find that the district court clearly erred in holding that Rinaldi failed to present credible evidence of being incapable to form the specific intent necessary to carry out crimes as charged.

Rinaldi's claim of factual innocence based upon his alleged bundled-fee billing arrangement is similarly unpersuasive. He argues that the IDPA permitted a prorated billing scheme such as his, and that he pleaded guilty only as a result of the government's hollow promise to demonstrate the system's impermissibility. The genesis of this claim was a policy statement drafted by David Spinner, a contract administrator with the state of Illinois. The document was produced in discovery and asserted that a dentist may bill for monthly adjustments "whether he sees the patient or not. Monthly payments will be made for approved treatment, as long as the client remains eligible and is in active treatment." *Rinaldi,* 347 F.Supp.2d at 602. In a letter dated March 5, 2002, however, the Government wrote to defense counsel:

> [T]he Illinois Department of Public Aid has disavowed this memorandum and clarified that in all instances, IDPA would deny payment for any claim for orthodontia service when a child is *not* physically present to receive the service. The 'final' word on that subject came from Steven Bradley, the head of the Bureau of Comprehensive Health Services for IDPA. According to Mr. Bradley, that has always been the policy of IDPA and the author or [policy statement] is simply wrong.

347 F.Supp.2d at 602. Further, David Spinner testified to these facts at the sentencing hearing. He stated that this policy statement was an erroneous interpretation of the contract administrator's Office Reference Manual, and that it was produced only in response to the government's discovery request. The statement was never distributed to dental providers during the period in which Rinaldi perpetrated his fraud, and it was disavowed by his superiors within a month of its being offered to the government.

After hearing this testimony, the district court found the disavowed Spinner memo, which formed the core of

Rinaldi's argument," irrelevant." Sentencing Hr'g Tr., Vol. I at 238, Oct. 14, 2005. Particularly persuasive was the fact that the "bundled-fee" scheme was never discussed prior to, or during, the time of the fraud. Further, the court noted that Rinaldi's argument was contradicted by the general handbook provided to participants in the Illinois Medical Assistance Program, to which Rinaldi was subject. This general handbook provided that unkept appointments are not subject to payment. In light of this evidentiary analysis by the district court, and the ongoing inability of the defendant to demonstrate how he could have been misled *after the fact* by the government's representations of his own fee system. Rinaldi's bundled-fee claim fails.

Further, we are definitively not persuaded that the district court made a mistake in its evidentiary findings on either of Rinaldi's claims to demonstrate a fair and just reason to withdraw his guilty plea. *United States v. Mendoza,* 2006 WL 2290702, No. 05-3323. slip op. at 5 (7th Cir. Aug. 10, 2006) (internal quotation omitted). We find that the court did not abuse its discretion.

B. Denial of Motion for Continuance

Rinaldi argues next that the district court erred in denying him the entire six months he requested to calculate the loss attributable to his fraud. A district court's decision to deny the continuance of the sentencing hearing will be upheld absent an abuse of discretion. *Zambrella v. United States,* 327 F.3d 634, 638 (7th Cir. 2003). To demonstrate such an abuse, Rinaldi must show that he was actually prejudiced by the court's refusal to grant the continuance. *United States v. Rodgers,* 755 F.2d 533, 539-40 (7th Cir. 1985) (citing *Morris v. Slappy,* 461 U.S. I, 11-12 (1983); "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of justifiable request for delay violates the right to the assistance of counsel."

(Internal quotations omitted)). Rinaldi claims the district court's decision prejudiced his ability to compile data that would have both negated his criminal intent and established the loss incurred by his fraud. As discussed above, the question of intent was settled on March 25,2002, when Rinaldi voluntarily pleaded guilty. Regarding the determination of loss, any prejudice he suffered was at his own hands.

Rinaldi first made the court aware of his intent to conduct a statistical sampling on the impact of his fraud on November 22, 2002. This was nine months after he pleaded guilty and more than three years before his sentencing hearing. Instead of following through with the study, however, Rinaldi apparently put the matter on hold and focused on withdrawing his guilty plea. During this time, he moved for, and was granted three continuances of his sentencing. It cannot be said that the district court arbitrarily insisted upon expeditiousness. *See id.* Contrarily, Judge Mills granted Rinaldi permission to issue a subpoena to the relevant state agencies to *aid* in his project. Then, in May 2005, when Rinaldi moved for a continuance to finalize the study, the district court again granted his motion, allowing three additional months, providing an explicit warning that it would be the "final continuance." Order, 4, (May 25,2005; (No. 144).

Further, in *United States v. Robbins,* 197 F.3d 829 (7th Cir. 1999), we upheld the district court's decision in proceeding to sentencing over defense counsel's objection only four months after trial. 197 F.3d at 847-48. When considering whether Robbins had been prejudiced by the denied continuance, our decision relied on, *inter alia,* the likelihood that additional time would have yielded information useful at sentencing. *Id.* Rinaldi's analytical methodology relied upon locating and interviewing former patients regarding their dates of treatment. These patients,

we keep in mind, were child or teenage wards of the state at the time of alleged treatment, and the dates in question ranged as far back 1994. The likelihood of their remembering or having maintained records on such matters for this length of time is questionable, thus casting doubt over the usefulness of the analysis as a whole.

Additionally, we note that the entire purpose of the statistical analysis was to reconstruct data that had been in Rinaldi's possession; data that he admitted concealing from the government. We find it hard to place blame for the outcome of Rinaldi's own actions on the shoulders of the district court. Considering the span of years between the entry of Rinaldi's guilty plea, the multiple continuances granted by the district court, and the questionable value of the analysis, we cannot find that no reasonable person would agree with the district court's denial of defendant's motion.

C. Reasonableness of the Sentence

Lastly, Rinaldi argues that the district court erred in failing to grant him a "downward departure" in his prison sentence and for imposing a fine of $500,000. After *United States v. Booker,* 543 U.S. 220 (2005), the concept of "departures" is outmoded; we review the district court's sentencing decisions for unreasonableness. 543 U.S. at 264; *United States v. Wallace,* 2006 WL 2338021, No. 05-3675, slip op. at 4 (7th Cir. Aug. 14, 2006); *United States v. Arnaout, 431* F.3d 994, 1003 (7th Cir. 2005). "District courts are aided in their determination of reasonableness via a mandatory examination of the factors set forth in 18 U.S.C. §3553(a)." *United States v. Lister.* 432 F.3d 754,761 (7th Cir. 2005). A sentence that falls within a properly calculated Guidelines range is entitled to a rebuttable presumption of reasonableness. *See United States v. Mykytiuk,* 415 F.3d 606, 608 (7th Cir. 2005). Where the sentence falls outside of the Guidelines range, however, it is incumbent upon the district court to provide a sound

justification according to the §3553(a) factors. *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). The greater the divergence, the greater the justification we seek to aid our review.

At the close of sentencing, the district court adopted the findings made in the PSR[1] and properly calculated Rinaldi's Guideline range at 15-21 months. After considering numerous issues that fall within the ambit of the §3553(a), Judge Mills imposed a sentence of 21 months' imprisonment. On appeal, Rinaldi argues that the district court failed to properly adjust his sentence for his "diminished capacity or mental status." This argument, however, makes no citations to the record, and ignores the full rehearing of both parties expert medical testimony that consumed the majority of the sentencing rehearing. In holding that there was no basis to grant a sentence below the Guideline range, the district court reflected on the personal success of Rinaldi's practice and the impact that his fraud had on the taxpayers of the state of Illinois and the federal government. *See Dean, 414* F.3d at 729 (point-by-point analysis of each sentencing factor not required). We therefore decline to find Rinaldi's 21 months' term of imprisonment unreasonable, *see Lister*, 432 F.3d at 761 (citing *United States v. George*, 403 F.3d 470, 472-73 (7th Cir. 2005)), and turn next to the district court's imposition of the $500,000 fine.

Both 18 U.S.C. §§1341 and 1347 provide for the imposition of a fine in addition to a term of imprisonment. For Rinaldi's offense level of 14, the suggested Guidelines

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[1] Contrary to Rinaldi's argument, it is well settled Circuit case law that such findings need be made by a preponderance of the evidence only, not beyond a reasonable doubt. See *United States v. Welch*, 429 F.3d 702, 704-05 (7th Cir. 2005).

fine is $4,000 - $40,000. V.S.S.G. § 5E1.2(c)(3). The statutory maximum amount is limited to no more than $250,000 per offense for individuals. 18 U.S.C. §3571 (b)(3). At sentencing, the district court properly calculated the Guidelines fine, reviewed the defendant's ability to pay as set forth in the PSR, and then imposed the statutory maximum: fining Rinaldi $500,000; $250,000 per offense. Rinaldi claims the court erred in its findings on his ability to pay and in imposing the maximum fine.

The district court, however, did not clearly err in relying on the only complete financial information with which it was provided. *See United States v. Olson,* 450 F.3d 655, 68384 (7th Cir. 2006). Despite Rinaldi's claim that the district court relied on outdated financial data contained in the original and revised PSR (March 31, 2003, and August 31, 2005, respectively), he failed to raise any objections on this point before or during his sentencing. Indeed, the only updated financial information to which he directs our attention is contained in an incomplete United States Probation Office questionnaire, labeled Defendant's Exhibit 64 at the sentencing hearing. As he notes, the document was considered at sentencing, but only as evidence of the defendant's mental state. In reviewing the value of the information contained therein, the district court noted that Rinaldi "was told upon several occasions by the probation office to fill out [the] financial forms and did so but only partially and did not do so completely.... " Sentencing Hr'g Tr., Vol. I at Tr. 22, Oct. 14, 2005. We fail to find the district court made a definite mistake in relying on information to which the defendant did not object, and for which he provided no reasonable alternative.

In examining the value of the fine, we review the district court's decision to impose the statutory maximum for unreasonableness. *Booker,* 543 U.S. at 264; *Arnaout, 431* F.3d at 1003. As with all sentences outside of the suggested

Guidelines range, we look to see if the district court has given us an adequate explanation for its divergence. "In doing so, we consider all of the district court's reasons, oral and written alike." *Wallace,* No. 05-3675 at 12. Because the fine imposed was more than twelve times the Guidelines suggestion, however, the district court's reasons must be particularly compelling. *United States v. Jordan,* 435 F.3d 693, 697 (7th Cir. 2006) (affirming district court's imposition of statutory maximum sentence 103 months above the Guidelines' range). They are.

At sentencing, Judge Mills gave the following statements when considering the mandate of § 3553(a):

> [T]he Court does feel that Dr. Rinaldi has committed a terrible crime against the people of Illinois, not heinous, not involving physical touching or injury, but he has bilked the taxpayers out of a tremendous amount of money. And we will never know the exact. amount of that.

Sentencing Hr'g Tr., Vol. III at 690, Oct. 18, 2005. Further, he specifically noted that

> [h]e's no better than a highwayman that pulls his pistols and [says] stand and deliver. And he has taken the taxpayers of Illinois and taxpayers of the United States right down the pea patch. I don't know the exact amount [of his fraud], none of us do. But we know that he's well-to-do, he's been eminently successful in his practice. His net worth stands at $2,340,200.

Id. at 688. This doubt regarding the extent of the fraud, the court noted, existed in part "because of the actions of the defendant." *Id.* at 689. Moments before announcing the sentence, the district judge expressed his concern "whether the sentence that I'm going to give will be a deterrence adequate enough." *Id.* at 690. In the court's subsequent

written opinion, it again recited the Guidelines suggested fine, and concluded that, pursuant to §3553(a)(6), "that a fine within that range would not adequately reflect the seriousness of the offense or provide just punishment for the offense." Opinion, 10 (Oct. 20, 2005) (No. 181). This statement also strikes at the heart of §3553(a)(2)(A) and (8) and dovetails neatly with the court's characterization of Rinaldi's crimes.

Ultimately, the district court's statements evidenced its open concern for the magnitude of Rinaldi's fraud, the difficulty encountered in ascertaining the full extent of the impact—the fault for which lay with the defendant's admitted obstruction of justice—and the possibility that Rinaldi may have benefitted from that obstruction. The Guidelines range, Judge Mills repeatedly noted, simply did not reflect the degree of harm the defendant had caused. *Id.* at 698. But the court distinguished the impact of Rinaldi's crime as one of non-violence and chose not increase his term of imprisonment, but opted instead to increase the fine; punishing the perpetrator with a correlate of his own crime. Because of this thorough analysis of the nature, circumstances, and seriousness of the offense in consideration of §3553(a), we cannot say that the district court's sentence was unreasonable. *See United States v Walker,* 447 F.3d 999, 1008 (7th Cir. 2006).

III. Conclusion

For the foregoing reasons, the defendant's guilty plea and sentence are AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-02-0072—8-31-06

FILED Feb. 27, 2003
John M. Waters, Clerk
U.S. District Court
of Central District of Illinois

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	No. 01-30110
	)	
SERGIUS RINALDI,	)	
Defendant	)	

OPINION

RICHARD MILLS, U.S. District Judge:

Defendant seeks to withdraw his guilty plea based, in part, on his assertion that he suffers from Adult Attention Deficit Disorder.

The Court finds nothing deficient about Defendant's guilty plea. Motion denied.

Dr. Sergius Rinaldi, D.M.D., a dentist specializing in orthodontics, practiced in Central Illinois for almost twenty-five years. On March 5, 2002, at the age of 66, Dr. Rinaldi entered a plea of guilty to the charges of mail fraud, 18 U.S.C. § 1341, and obstruction of justice, 18 U.S.C. § 1518.

Now, almost one year later, Dr. Rinaldi seeks to withdraw his plea because he claims he is not actually guilty of the charged offenses.

BACKGROUND

The Indictment charged Defendant with submitting false claims to Medicaid and destroying records to prevent the Government from detecting the scheme. The Medicaid program was established to provide medical assistance to indigent persons. The federal government provides approximately one half of the money for Medicaid while the rest of the cost is provided by the State of Illinois. The Illinois Department of Public Aid (IDPA) administers Medicaid.

The IDPA established procedures to compensate orthodontists and other medical practitioners for services provided to Medicaid recipients. Dental providers were required to submit invoice forms to a company which administered the Medicaid program for dental services on behalf of IDPA. Prior to March 1, 1999, this entity was "Delta Dental." After March 1, 1999, this entity was "Doral Dental." These companies, or carriers, had a contract with IDPA to administer claims for dental and orthodontic services. Claims for children, who were wards of the State of Illinois or otherwise under the jurisdiction, custody or protection of the Illinois Department of Children and Family Services (DCFS), were submitted to IDPA through DCFS.

Defendant claims at the time of his guilty plea he was under the impression that the IDPA only paid for orthodontic procedures on a "fee for service" basis, meaning, IDPA only paid a practitioner when he actually performed a service.[1] Under such a system, an orthodontist who knowingly

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[1] When the Court refers to a payment by IDPA, it is referring to a payment made by Doral or Delta Dental to Defendant on behalf of IDPA.

submitted an invoice for a service not actually performed would be committing fraud.

Subsequent to entering the plea, "the Defense" discovered that Defendant submitted invoices using a "bundling fee" system, meaning, Defendant billed a flat rate for applying braces and making monthly adjustments and was entitled to a monthly payment on the "remaining balance" whether a patient actually received a service each month or not. Defendant now claims IDPA issued payment to orthodontists under either a "fee for service" or "bundling fee" system. Therefore, an orthodontist who submitted an invoice for a service not actually performed may not be committing fraud. Nevertheless, Defendant claims he suffers from Adult Attention Deficit Disorder (AADD), which prevented him from forming any criminal intent.

Defendant claims these "discoveries" are significant because if he is correct, he believes he is not guilty of mail fraud or obstruction of justice. However, these are revelations that should have occurred a year ago before Defendant took a solemn oath and testified he was guilty of the crimes charged .

ANALYSIS

Once a district court has accepted a defendant's guilty plea, "the defendant does not have an unlimited right to withdraw" it. United States v. Milquette, 214 F.3d 859,861 (7th Cir. 2000). In fact, a defendant can only withdraw it if he can "show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11 (d)(2)(B). This is a heavy burden and it rests entirely on the defendant. United States v. Underwood, 174 F.3d 850, 852 (7th Cir. 1999); United States v. Ellison, 835 F.2d 687, 693 (7th Cir. 1987). "When a defendant wishes to withdraw his plea after he states at a Rule 11 hearing that it was freely and knowingly given, he 'faces an uphill battle in persuading the judge that his

purported reason for withdrawing his plea is fair and just.'" United States v. Schilling, 142 F.3d 388, 398 (7th Cir. 1998) quoting United States v. Trussel, 961 F.2d 685, 689 (7th Cir. 1992).

Serious allegations of legal innocence, newly discovered evidence or of a previously unknown or unavailable defense often require a plenary examination. United States v. Gomez-Orozco, 188 F.3d 422, 426 (7th Cir. 1999); United States v. Groll, 992 F.2d 755, 758 (7th Cir. 1993); United States v. Silva, 122 F.3d 412,415 (7th Cir. 1997). However, courts are reluctant to acquiesce when a defendant moves to withdraw based on facts known at the time he entered the guilty plea. Silva, 122 F.3d at 415.

When deciding to plead guilty, a defendant considers "imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time." Brady v. United States, 397 U.S. 742, 757 (1970). "A defendant is not entitled to withdraw his plea merely because he has misapprehended the strength of the government's case or, upon reevaluation of the situation, can conceive of an arguable defense." Silva, 122 F.3d at 415. Allowing a motion on that basis would "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess." United States v. Hyde, 520 U.S. 670,677 (1997).

Here, Defendant asserts that he is not guilty of mail fraud because he used a "bundling fee" procedure, which according to the Dental Policy Clarification explained on discovery page 1026, was a billing method accepted by IDPA. However, the information on which Defendant bases his argument was known at the time he entered his guilty plea.

First, there is no allegation that Defendant did not know, after practicing for over two decades, how he billed IDPA.[2] Second, Defendant admits he possessed discovery page 1026 at the time he entered his plea. As already discussed, a defendant is not entitled to withdraw his plea merely because he has reevaluated the evidence. See Silva, 122 F.2d at 415. Defendant argues the Government persuaded him that discovery page 1026 did not accurately reflect IDPA's policy.

Regardless, Defendant does not allege he was prevented from conducting his own investigation, prior, to entering a guilty plea, to determine whether IDPA accepted "bundled" billing and whether that would be a viable defense at trial. He cannot now successfully argue that a new look at evidence, which was available at the time of his guilty plea, is a "fair and just reason" to withdraw. Underwood, 174 F.3d at 854 (holding that a "reevaluation of [defendant's] trial prospects afforded no basis for withdrawing his validly-entered guilty pleas").

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[2] Defendant's motion only states that "the Defense has now with the assistance of a health care attorney, Amy Woodhall, determined that the billing and practice procedure for orthodontia was bundling." Ms. Woodhall hails from Cleveland, Ohio. Ms. Woodhall and Thomas Dawson, Defendant's attorney from Leavenworth, Kansas, have recently been quoted in an article published in the Physician Practice Options, a newsletter available online at mdoptions.com. The article is entitled, Are Medicare Regulations Unfair? and expresses concern over the federal government's intense effort to eliminate fraud. According to the article, the Medicare regulations are so voluminous and contradictory that reasonable individuals cannot be expected to follow them. David Kettlewell, *Are Medicare Regulations Fair?*, PHYSICIAN PRACTICE OPTIONS, October 15,2002, at 3. According to Mr. Dawson, "the Medicare regulations covering what a physician can charge for care of patients provided by the staff are confusing, and doctors' practices are being destroyed." Id. Ms. Woodhall stated that as a result of the confusion, "doctors are spending less time with patients. There has to be a cost-to-benefit proportionality to society as a whole before rules are issued and enforced." Id. at 5.

Defendant's motion flies in the face of the testimony he provided at the change of plea hearing conducted on March 5, 2002. Defendant cannot disassociate himself from that testimony simply because he now believes he can present a defense to the crime.

The whole point of the Rule 11 colloquy is to establish that the plea was knowingly and voluntarily made. See Ellison, 835 F.2d at 693. A "presumption of verity" attaches to statements made by a defendant at a Rule 11 hearing. United States v. Redig, 27 F.3d 277,280 (7th Cir. 1994). "To deter abuses in the withdrawal of guilty pleas...and to protect the integrity of the judicial process, we have held that 'rational conduct requires that voluntary responses made by a defendant under oath [when entering a guilty plea]... be binding.'" United States v. McFarland, 839 F.2d 1239, 1242 (7th Cir. 1988) quoting Ellison, 835 F.2d at 693. "[W]hen the record indicates that the defendant was aware of the reasons supporting [his] motion to withdraw when [he] entered [his] plea ... the district court is generally justified in discrediting the proffered reasons for the motion to withdraw and holding the defendant to [his] admissions at the Rule 11 hearing." United States v. Groll, 992 F.2d 755, 758 (7th Cir. 1993).

Assistant United States Attorney Patrick Hansen presented the factual basis for the plea.

AUSA Hansen: Were the case to go to trial, your Honor, the Government would show that during the years 1994 through 2001, Sergius Rinaldi was an orthodontist practicing from offices in Springfield and Edwardsville, Illinois. Among his clients were wards of the State of Illinois under the protection of the or custody of the Illinois Department of Children and

Family Services, DCFS, as well as those receiving Medicaid assistance from the Illinois Department of Public Aid, IDPA. During this period of time, the Defendant would bill DCFS and Medicaid for services regarding these patients which included monthly adjustments to braces. Among the bills submitted to DCFS and IDPA were bills for services he did not perform including several of these monthly adjustments.

The Government's evidence would also include at least two occasions when Dr. Rinaldi billed for putting braces on children which was not done by Rinaldi.

Specifically as to Count 1 of the indictment, the evidenced [sic] would show on or about September 19, 2000, the Defendant did cause the use of the United States mail by knowingly submitting and causing to be submitted a claim to the Illinois Department of Public Aid for a monthly adjustment alleged to have been provided to a client identified as JB or identified with the initials of JB on August 9, 2000, when, in fact, the client was not in the State of Illinois at the time. The payment for the service as well as others was made on or about September 19, 2000 by Dorel [sic] Dental on behalf of the Illinois Department of Public Aid by a check which was sent to the Defendant in Springfield, Illinois through the United States mail.

* * *

The Court:	Very well. Mr. Rinaldi, did you listen closely?
Mr. Rinaldi:	Yes, I did.
The Court:	Did you understand Mr. Hansen's words?
Mr. Rinaldi:	Yes, I did.
The Court:	Were you following along as the Court was also following along in paragraph 16 of the amended plea agreement?
Mr. Rinaldi:	Yes, I did.
The Court:	Do you dispute, disagree with any of the statements made by Mr. Hansen?
Mr. Rinaldi:	No.
The Court:	Very well. Did you do what Mr. Hansen said you did?
Mr. Rinaldi:	Yes
The Court:	Very well. From 1994 through 2001, were you an orthodontist in the Springfield and Edwardsville area, and did you have clients that were DCFS wards and Medicaid patients?
Mr. Rinaldi:	Yes, I did.
The Court:	As part of your duties as an orthodontist, do you have monthly - did you bill for monthly adjustments for braces?
Mr. Rinaldi:	Yes, I did.
The Court:	Did you also bill for actual braces being applied?
Mr. Rinaldi:	Yes, I did.

The Court:	As stated by Mr. Hansen, did you bill - through these two entities, did you bill for work that you did not perform?
Mr. Rinaldi:	Yes, I did.
The Court:	Specifically as to Count I, did you do the billing as specified, the billing of September 19th, 2000 monthly adjustment for work on August 9, 2000 for a patient with the initials that goes by JB, work that you did not perform?
Mr. Rinaldi:	Best of my memory I did, yeah.
The Court:	Very well. That claim would have been submitted through the US mail?
Mr. Rinaldi:	Yes.
The Court:	That is the ordinary course of your business?
Mr. Rinaldi:	Yes, uh-huh.
The Court:	Very well. Would you have been paid by a check that would be sent through US mail?
Mr. Rinaldi:	Yes.
The Court:	And submitted these claims you knew were false, correct, sir?
Mr. Rinaldi:	Yes.

Whether Defendant submitted bills using a "fee for service" or "bundling fee" system makes no difference when the Court considers Defendant's statements at the plea colloquy. Defendant admitted he knowingly submitted false claims. This admission, made under oath, is not without consequence.

> [M]any defendants seem to be under the misapprehension that a guilty plea is just provisional, and an oath to tell the truth means nothing....Entry of a plea is not some empty ceremony, and statements made to a federal judge in open court are not trifles that defendants may elect to disregard.

United States v. Stewart, 198 F.3d 984, 987 (7th Cir. 1999)

Defendant also makes the argument that he suffers from Adult Attention Deficit Disorder. To bolster his claim, he has attached a copy of a report written by Dr. Robert E. Chapman. Dr. Chapman earned a Doctor of Medicine in 1961 and has been certified by both the American Board of Psychiatry and Neurology and the American Board of Forensic Psychiatry. Dr. Chapman has been in private practice for over thirty years and specializes in criminal aspects of forensic psychiatry. Dr. Chapman diagnosed Defendant "with AADD, but opined that Defendant was competent to enter a guilty plea.

Defendant claims that because of this disorder, he has a limited capacity to organize and complete projects as well as impaired impulse control. Defendant asserts that if he proceeds to trial, he will argue that the Government cannot prove he possessed the requisite mens rea because AADD diminished his capacity to form criminal intent.

Defendant has not informed the Court why this defense was unknown or not available prior to the guilty plea.[3] At the change of plea hearing, the Court asked whether Defendant and his attorneys had discussed possible defenses.

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[3] The Court recognizes that diminished capacity is not an affirmative defense but rather an attack on one of the elements of the offense. However, for ease of language, the Court will refer to diminished capacity as a defense.

The Court: Very well. Mr. Costello, have you and Mr. Miller received a copy of the indictment?

Mr. Costello: Yes, your Honor.

The Court: Have you reviewed same with Mr. Rinaldi?

Mr. Costello: In depth, your Honor.

The Court: Have you also discussed with your client the discovery provided by Government, any defenses he may have, and have you also discussed the sentencing guidelines, in general, as they apply to his case?

Mr. Costello: All three, your Honor.

The Court: Very well. Mr. Rinaldi, will you confirm having, in fact, discussed all those aspects of your case with Mr. Costello and/or Mr. Miller?

Mr. Rinaldi: Yes, I have.

The Court asks these questions because prior to entering a plea, a defendant must take stock of the situation and evaluate all potential avenues of relief. A guilty plea "is not a 'road-show tryout.'" United States v. Underwood, 174 F.3d 850, 854 (7th Cir. 1999) quoting Hugi v. United States, 164 F.3d 378,382 (7th Cir. 1999). The Court cannot allow Defendant to withdraw his plea because he has concocted, after a year of plotting and planning, defenses to the crimes charged.

Defendant's Rule 11 hearing testimony contradicts Dr. Chapman's professions of impaired capacity. Defendant testified that he knowingly submitted false claims to the IDPA. As to the obstruction of justice count, Defendant admitted to removing documents that were responsive to the grand jury's subpoena in an attempt to obstruct and prevent those documents from being obtained by federal investigators. Defendant stated that he was pleading guilty to

both counts because he was, in fact, guilty. AUSA Hansen presented the factual basis for the obstruction charge.

Mr. Hansen: Additionally, as to Count 13, the Government's evidence would show that the Defendant became aware federal investigators were looking into his billing practices when he received a grand jury subpoena for records on or about January 23rd, 2001. Between January 23rd, 2001 and July 3rd, 2001, he removed certain records from his office that were responsive to the subpoena and did attempt to obstruct and prevent communication of these records to the investigators. On or about July 3rd, 2001, the Defendant was seen removing certain records from his office in anticipation of a search by federal agents later that day. The records were recovered and did include certain sign-in sheets and recap sheets which were, in fact, responsive to the subpoena issued.

* * *

The Court: Very well. As relates to Count 13, did you receive a Grand Jury subpoena for records on or about January 23, 2001?

Mr. Rinaldi: Yes, I did.

The Court: Between the dates of 1-23-01 and 7-3-01, did you remove certain records from your office that would have been responsive to the subpoena and underlying investigation?

Mr. Rinaldi: Yes, I did.

* * *

The Court: At this time, how do you plead to Count 1 as charged? Do you plead guilty or not guilty?

Mr. Rinaldi: Guilty.

The Court: How do you plead as to Count 13, guilty or not guilty?

Mr. Rinaldi: Guilty.

The Court: Are you pleading guilty because you are, in fact, guilty?

Mr. Rinaldi: Yes.

The Court: Are you pleading guilty of your own free will?

Mr. Rinaldi: Yes.

CONCLUSION

Defendant has presented no fair and just reason that would require the Court to allow Defendant to withdraw his guilty plea. Defendant has not explained why he waited until almost a year after his plea to investigate possible defenses. Interestingly, Defendant's Motion to Withdraw was filed shortly after the Government indicated it would be seeking an upward departure at sentencing. Courts are leery of such reactionary motions to withdraw and are not inclined to facilitate obviously tactical moves by defendants. Underwood, 174 F.3d at 854 (stating that a defendant is not entitled to withdraw his guilty plea simply because he did not anticipate the contents of the Pre-sentence Investigation Report). Regardless of what motivated Defendant's motion, he has not met his burden.

Ergo, Defendant's Motion to Withdraw Plea of Guilty is DENIED. The Government's Motion to Supplement Response is ALLOWED.

ENTER: 27 Feb., 2003
FOR THE COURT:

s/Richard Mills
United States District Court

E-FILED
Thursday, 09 December, 2004
02:45:01 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	No. 01-30110
	)	
SERGIUS RINALDI,	)	
Defendant	)	

OPINION

Richard mills, U.S. District Judge:

The Defendant's motion to withdraw his plea of guilty was denied in February 2003.

He now seeks reconsideration of that ruling.

Reconsideration is denied

The case will proceed to sentencing.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Sergius Rinaldi, D.M.D., a dentist specializing in orthodontics, has practiced in Central Illinois for approximately 25 years, with offices located in Springfield and Edwardsville, Illinois. His clients have included wards of the State of Illinois under the protection of--or in the custody of--the Illinois Department of Children and Family Services("DCFS"), as well as those receiving Medicaid assistance from the Illinois Department of Public Aid ("IDPA").

This case has a lengthy procedural history. On November 9, 2001, a thirteen-Count Indictment was returned against the Defendant. On March 25, 2002, the Court accepted the Defendant's pleas of guilty to mail fraud (Count 1) and obstruction of a health care fraud investigation (Count 13). The Defendant has not been sentenced in this case. On January 29, 2003, the Defendant filed a motion to withdraw his guilty pleas. That motion was denied by the Court on February 27, 2003. The Court reasoned that the Defendant had presented no fair and just reason which would require it to allow him to withdraw his guilty plea.

A. The Defendant's AADD Argument

On March 19, 2003, the Defendant filed a motion asking the Court to reconsider the guilty plea. While that motion was pending, the Defendant appealed the Court's April 10, 2003 Order committing him to the custody of the Attorney General for a mental evaluation. One of the bases on which the Defendant initially sought to withdraw his guilty plea is that he suffers from Adult Attention Deficit Disorder ("AADD"), and that the disorder prevented him from forming the requisite criminal intent at the time of the offenses. In a report dated January 9, 2003, the Defendant was diagnosed by Robert Chapman, M.D., MBA, as having AADD. Dr. Chapman opined that the Defendant's capacity to form criminal intent was diminished as a result of his AADD. In a report dated January 28, 2004, George Athey, Jr., Ph.D., ABPP, also opined that the Defendant is "not capable of formulating and carrying out the intent to defraud with which he has been charged."[1]

The Court ordered an additional mental evaluation because of the Defendant's argument that he was unable to

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[1] The Defendant was referred by his attorney to Dr. Athey for a neuropsychological and psychological evaluation.

form the requisite criminal intent because of his AADD. On May 5, 2003, the Defendant filed a notice of appeal from that Order directing him to submit to a custodial mental examination. This case was stayed while the Defendant's interlocutory appeal was pending. On December 1, 2003, the Seventh Circuit concluded that this Court's Order for a custodial mental evaluation of the Defendant was improper. However, the Seventh Circuit determined that the Court "may invite the defendant to consent to an outpatient examination." United States v. Rinaldi, 351 F.3d 285, 289 (7th Cir. 2003).

Following the remand from the Seventh Circuit, the Defendant was given one week to inform the Court whether he consented to an outpatient examination. The Defendant did consent to such an examination. Both the Defendant and the Government filed suggestions regarding the examination procedure. In an Order entered on March 11, 2004, the Court appointed Sue Moriearty, Ph.D., ABPP, to perform a psychological evaluation of the Defendant. Pursuant to the Government's request, the Court appointed Phillip E. Bornstein, M.D., FAPA, as an additional expert. The reports of Dr. Moriearty and Dr. Bornstein have been received by the Court. The parties have filed supplements to their briefs.

B. The Defendant's Billing Argument

The Defendant also seeks to withdraw his guilty plea on the basis that he was informed by the Government prior to the entry of the plea that IDPA, the agency which administers the Medicaid program in Illinois, only paid for orthodontic procedures on a "fee for service" basis, requiring the practitioner to actually perform the service that is billed. IDPA has established procedures to compensate orthodontists and other medical practitioners for services provided to Medicaid recipients. It also has certain rules and regulations which were published for providers in the Medicaid program. Dental providers were required to submit

invoice forms to a company which administered the Medicaid program for dental services on behalf of IDPA. Prior to March 1, 1999, the entity was Delta Dental; after that date, it was Doral Dental. These companies, or carriers, had a contract with IDPA to administer claims for dental or orthodontic services. Claims for children who were wards of the State of Illinois or were otherwise under the jurisdiction, custody, or protection of the Illinois Department of Children and Family Services ("DCFS") were submitted to IDPA through DCFS.

The Defendant contends that he committed no crime if a "bundled fee" procedure, instead of fee for service, was a permissible method of billing. He claims that if the proper billing procedure for orthodontia was a fee for service method, then he would be expected to see the client and provide a specific service on each date billed. If the practice and billing procedure for orthodontia is a bundled fee arrangement, however, then the bills would be sent monthly for what was going to be a "flat fee" for a specified number of months. These bills would be sent and the money owed by the Medicaid program whether the patient was actually in the office on that date or during the month.

The Defendant contends that prior to pleading guilty, he believed that he had correctly billed Medicaid under this bundled fee arrangement. In his motion to reconsider, the Defendant alleges that he and counsel were convinced by the Government that the Defense position regarding the propriety of the bundled fee procedure was incorrect as a matter of law. Moreover, the Defendant states he was informed by the Government that it would provide the Defense with the "law" demonstrating that its position was correct. The Defendant alleges the Government failed to provide the promised law confirming that IDPA paid on the basis of a fee for service. He claims it was only after the Government's failure to produce this information that he

learned that IDPA paid for services with a bundled fee arrangement. The Defendant contends the bundled fee arrangement allowed the orthodontist to bill monthly whether the service was actually performed that month or in fact performed multiple times during a given month.

The Defendant alleges that the plea is invalid both factually and legally. Accordingly, he contends that he is seeking to withdraw the pleas on the basis of actual innocence.

II. ANALYSIS

A. The Legal Standard

There is no absolute right to withdraw a guilty plea. See United States v. Abdul, 75 F.3d 327, 329 (7th Cir. 1996). A defendant may withdraw a guilty plea before a court imposes sentence if he meets his burden of showing "a fair and just reason for requesting the withdrawal." See United States v. Bennett, 332 F.3d 1094, 1099 (7th Cir. 2003); Fed. R. Crim. P. 11(d)(2)(B). A defendant seeking to withdraw a guilty plea faces an "uphill battle" after a thorough Rule 11 colloquy. See Bennett, 332 F.3d at 1099.

B. The Defendant's AADD Diagnosis

The Defendant alleges it was not until well into the course of this litigation that the Defense team discovered his AADD problem. It was following a meeting with the Defendant when his attorneys, the investigator, and the Defense expert discussed the problems each encountered with the Defendant's lack of organization and ability to logically relate. A decision was then made to have the Defendant evaluated by a forensic psychiatrist. Based on Dr. Chapman's diagnosis of AADD, the Defendant contends that the Government cannot prove beyond a reasonable doubt that he possessed the requisite intent to commit the offenses to which he pled guilty.

The Defendant alleges the charges at issue are specific intent crimes and that inadvertent, negligent, or reckless actions fail to prove specific intent. Dr. Chapman found that an alternative explanation of the Defendant's behavior that the Government has identified as knowing criminal conduct is that it results from his "limited capacity to organize and follow through driven by impaired impulse control." Dr. Chapman opined that this limited capacity, if true, would explain hiding documents and altering records. He further determined that a diminished capacity to form criminal intent would apply to all of the charges and allegations of which he is aware. Significantly however, Dr. Chapman found that the Defendant's limitations associated with AADD "did not rise to the level of incompetence to plead, stand trial, or proceed." Moreover, Dr. Chapman concluded that there is no further "clinical evidence of any mental condition that substantially impaired [the Defendant's] competence" during the relevant period.

The Government notes that neither Dr. Moriearty nor Dr. Bornstein has found any cognitive dysfunction with the Defendant. Dr. Moriearty found that the Defendant did not clearly meet the criteria for AADD or Malingering.[2] She opined that he functions within the average range when compared to other men nearing the age of 70. Dr. Moriearty stated it would have been unlikely that she would have probed regarding an AADD diagnosis without the advance notice of that issue. She further noted that the Defendant on several occasions gave answers about AADD symptoms which were "a bit too on target and revealed a perhaps

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[2] Dr. Moriearty referred to the Defendant's alleged disorder as "Attention-deficit/hyperactivity disorder." She states that is the current terminology used in the *Diagnostic and Statistical Manual of Disorders* (DSM-IV; American Psychiatric Association, 1994). In the interest of consistency, the Court will continue referring to the Defendant's alleged condition as "AADD."

suspiciously familiar acquaintance with [AADD] diagnostic criteria." However, Dr. Moriearty emphasized that most adults have some symptoms which are consistent with AADD, but not to the extent that a formal diagnosis is warranted. According to Dr. Moriearty, the presence of six or more out of eight symptoms of inattention that have persisted for at least six months to a degree that is "maladaptive and inconsistent with development level"[3] The presence of six or more symptoms of hyperactivity-impulsivity that have persisted at that level is also consistent with such a diagnosis.[4] Dr. Moriearty determined that some of the Defendant's self-reported symptoms are probably true,

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[3] Dr. Moriearty noted the following symptoms of inattention: (1) often fails to give close attention to detail or makes careless mistakes; (2) often has difficulty sustaining attention in tasks; (3) often does not seem to listen when spoken to directly; (4) often does not follow through on instructions and fails to finish duties in the work place (not because of a failure to understand instructions); (5) often has difficulty organizing tasks; (6) often avoids, or dislikes, or is reluctant to engage in tasks that require sustained mental effort; (7) often loses things necessary for tasks; and (8) often is easily distracted by extraneous stimuli.

[4] The symptoms of hyperactivity include the following: (1) often fidgets with hands or feet or squirms in a seat; (2) often leaves seat when remaining in seat is expected; (3) often experiences feelings of restlessness; (4) often has difficulty quietly engaging in leisure activities;(5) often is "on the go" or acts as if "driven by a motor;" and (6)often talks excessively. The symptoms of impulsivity include the following: (a) often blurting out answers before question has been completed; (b) often has difficulty awaiting turn; and (c) often interrupts or intrudes on others.

but those symptoms are not sufficiently severe to suggest that he currently meets the criteria for an AADD diagnosis.[5]

Dr. Moriearty also considered whether the Defendant was malingering, or intentionally producing false or grossly exaggerated symptoms. She noted that because some exaggeration of information is expected in a legal context, there are those who believe that the AADD symptoms are too easily met. Dr. Moriearty determined that while there appeared to be some discrepancy between the Defendant's symptoms and her findings, it was not to the extent which would support a diagnosis of malingering.[6] Accordingly, she found that the Defendant did not meet the two criteria necessary for a DSM-IV diagnosis of malingering.

Dr. Moriearty opined that the Defendant's symptoms, even as described and perhaps exaggerated by him, would not render him incompetent when applied to most legal standards. She further determined that he functions within the normal range on most tasks. Accordingly, Dr .Moriearty concluded that the Defendant does not clearly meet the criteria for AADD or malingering.

Dr. Bornstein also examined the Defendant to determine whether he suffers from any disorder which would interfere

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[5] Based on interviews with the Defendant and the Defendant's wife, Ronald E. Zek, PhD, determined that the Defendant meets the DSM-IV criteria for AADD. Dr. Zek further found that because of the symptoms of inattention, hyperactivity, and impulsivity associated with AADD, it "significantly contributed to the [Defendant's] disorganization at work with respect to his paperwork and his poor record keeping." The Defendant was referred by his attorney to Dr. Zek for a cognitive assessment for dementia.

[6] Malingering should be suspected if a person is referred by his attorney for an examination and one of the following factors is present:(1) significant discrepancy between the person's asserted stress or disability and the objective findings; (2) lack of cooperation during the evaluation and in complying with the prescribed treatment regimen; or(3) presence of antisocial personality disorder.

with his competence to: (1) stand trial; (2) enter into a plea negotiation; or (3) form the criminal intent to defraud. He determined that the Defendant has narcissistic personality disorder, which is defined as "[a] pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy, beginning by early adulthood and present in a variety of contexts."[7] However, Dr. Bornstein stated that this personality disorder does not interfere with the Defendant's ability to form criminal intent to defraud, to cooperate fully with his attorney on his behalf, or to enter into plea negotiations or to plead guilty. Dr. Bornstein found that there is no evidence of any psychiatric disturbance which would interfere with the Defendant's ability to form the criminal intent to defraud or to understand the charges against him and cooperate fully and completely in his defense.

Dr. Bornstein further noted that during the relevant times, the Defendant was able to design and build a building for his own use. Moreover, the Defendant was able to practice orthodontia in two offices in a manner which he describes as "excellent and above average." Dr. Bornstein determined that the Defendant's intellectual capacity is clearly above average.

Dr. Bornstein further found that if the Defendant does have a mild cognitive disorder at this point in his life, it would more likely be due to some form of mild early

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[7] The presence of five or more of the following factors supports a diagnosis of narcissistic personality disorder: (1) a grandiose sense of self importance;(2) preoccupation with fantasies of unlimited success, power, brilliance, beauty or ideal love; (3) believes that he is "special" and unique and can only be understood by, or should associate with, other special or high-status people; (4) needs excessive admiration; (5) has a sense of entitlement; (6) takes advantage of others to achieve his own ends; (7) lacks empathy; (8) is often envious of others or believes that others are envious of him; and (9) exhibits arrogant, haughty behavior or attitudes.

dementia such as Alzheimer's. Significantly, neither a mild cognitive disorder nor AADD would interfere substantially with the Defendant's intellectual functioning. Dr. Bornstein determined, therefore, that these disorders are of no legal or clinical significance. Accordingly, he concluded that the Defendant is not precluded from forming the criminal intent to defraud because of any disorder.

The Defendant contends that each of his arguments involves a claim of actual innocence pursuant to United States v. Gomez-Orozco, 188 F.3d422 (7th Cir. 1999), and he should be allowed to withdraw his guilty plea on that basis. In Gomez-Orozco, the Seventh Circuit considered the motion to withdraw a guilty plea to illegal re-entry by an alien. Gomez-Orozco, 188F.3d at 424. The Seventh Circuit concluded that because there was substantial evidence tending to show that the defendant was an American citizen, his claim of legal innocence presented a fair and just reason as to why he should be allowed to withdraw his guilty plea. See id. at 427. For the reasons that follow, the Court concludes that the Defendant's AADD diagnosis did not prevent him from forming criminal intent. Accordingly, he has not presented a claim of actual innocence as to that issue.

After carefully considering the reports which have been submitted and the arguments of the parties, the Court is unable to conclude that the Defendant lacked the requisite intent, because of AADD or any other disorder, to commit the crimes of mail fraud or obstruction of a health care fraud investigation. The Court agrees with the conclusions of Dr. Moriearty and Dr. Bornstein regarding the Defendant's competency and ability to form criminal intent. The Court finds that it is particularly significant the Defendant was able to perform his tasks as an orthodontist in a manner that was, in his own words, "excellent and above average." As Helen

P. Appleton, PhD.,[8] observed, "It is incongruous that [the Defendant] could be so disabled by ADD or a Cognitive Disorder that he would be unable to form the intent to defraud, complete his paperwork, or bill properly while he was able to perform the full range of tasks required of an orthodontist." The Court finds this argument made by Dr. Appleton and others to be particularly persuasive.

The Court also observes that some of the symptoms associated with AADD, as suggested by Dr. Moriearty, are quite easily met. The Court does not suggest that the Defendant was malingering. However, it is evident from human experience that several of the symptoms of AADD are present in a relatively substantial percentage of the population. The Court declines to hold that the presence of even a large number of these symptoms precludes an individual from forming the requisite intent to defraud.

Based on the foregoing, the Court concludes that the Defendant's alleged AADD did not interfere with his ability to form criminal intent. Accordingly, the Defendant's motion to reconsider on that basis the Order and Opinion denying the motion to withdraw his guilty plea is DENIED.

C. The Defendant's Billing Argument

The Defendant also seeks to withdraw his guilty plea on the basis that the bundled fee procedure he used in billing Medicaid is not unlawful. The Court's previous Order and Opinion denying the Defendant's motion to withdraw his guilty plea was based in part on its conclusion that the Defendant was aware of the information on which he based his argument at the time of the plea. The Defendant notes that IDPA, "by rule, shall determine the quantity and quality of and the rate of reimbursement for the medical assistance

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[8] The Defendant was referred to Dr. Appleton for a psychological evaluation to be used in conjunction with Dr. Bornstein's psychiatric evaluation.

for which payment will be authorized . . . which may include . . . dental services." See 305 ILCS 5/5-5(10). The Defendant further alleges that the Illinois rules for dental services covered by IDPA do not address the quantity of follow-up visits required for orthodontics. See 89 Ill. Admin. Code §§ 140.420, 140.421.

In support of his motion to reconsider, the Defendant alleges that prior to the entry of the plea of guilty, he believed he had correctly billed Medicaid under a bundled fee arrangement. The Defendant's attorney raised that issue with counsel for the Government. The Defendant contends, however, that he was convinced by the Government that the Defense position was incorrect as a matter of law, and that the Government would provide the Defense with legal authority showing this to be the case. The Defendant asserts the Government has never provided the promised documentation that this case involved a fee for service. Moreover, he alleges the Defense was actively investigating the propriety of the bundled fee system; this investigation was abandoned based on the Government's representation that it would provide the law supporting the indictment. The Defendant contends it was only after the Government failed to present the promised law that he took additional steps to evaluate the merits of the bundling claim.

The Defendant alleges that following the Government's failure to provide support that IDPA paid on the basis of a fee for service, he learned that it paid for services with a bundled fee arrangement. Accordingly, an orthodontist was allowed to bill monthly whether the service was actually performed that month or performed multiple times during a given month. The Defendant asserts that the Medicaid regulations create a bundled fee system. Consequently, the dates of service would not be material, and the claims submitted to IDPA for reimbursement cannot sustain a fraud conviction, given that they do not convey a material false

statement. The Defendant asserts this is a claim of actual innocence pursuant to Gomez-Orozco, 188 F.3d at 427.

Relying on United States v. Mead, 533 U.S. 218, 234, 121 S. Ct. 2164, 2175 (2001), the Defendant asserts he cannot be found guilty of a fraud count based on an agency interpretation of regulations or statutes. If a policy has not been subjected to formal rule making (such as agency rulings, interpretations contained in policy statements, agency manuals, and enforcement guidelines), it does not have the force of law. The Defendant's argument as to the billing procedure is based on a policy statement contained in the Dental Policy Clarification which was produced in discovery:

> Question 4: If the monies are not distributed fee for service, and the provider receives a prorated dollar amount as above, does the patient have to be seen monthly, etc?
>
> Response: The dentist can bill the monthly adjustments code #08670 whether he sees the patient or not. Monthly payment will be made for approved treatment as long as the client remains eligible and is in active treatment. Since these cases are severely medically necessary cases with excessive disfunctional[sic] problems, the dentist will usually have to see the client on a monthly basis just to adjust the braces as the teeth become aiigned [sic].

In support of his argument that he should be allowed to withdraw his guilty plea, the Defendant contends the Defense team has never received the law contradicting the policy statement noted above, which he alleges allows billing based on a bundled fee arrangement. The Defendant asserts the Government has provided only the opinions of various individuals, and not a regulation or statute.

In a letter to the Defendant's attorney regarding that memorandum, counsel for the Government stated in pertinent part:

> [T]he Illinois Department of Public Aid has disavowed this memorandum and clarified that in all instances, IDPA would deny payment for any claim for orthodontia service when a child is not physically present to receive the service. The 'final' word on that subject came from Steven Bradley, the head of the Bureau of Comprehensive Health Services for IDPA. According to Mr. Bradley, that has always been the policy of IDPA and the author or page 1026 is simply wrong.

The letter containing the above passage is dated March 5, 2002; the Defendant's plea of guilty was entered before the magistrate judge on the same day and accepted by this Court approximately three weeks later. A letter dated June 21, 2002 from Government counsel to the Defendant's attorney provides in pertinent part:

> I have enclosed section 103 of the IDPA provider manual which specifically provides that 'services and supplies for which payment will not be made include, but are not limited to. . .unkept appointments.'
>
> As you know, we disclosed a memorandum from a person at IDPA suggesting a contrary policy as it regards dentists (bates22number 1026) through the discovery process on or about February 21, 2002. We also discussed this specific document prior to the plea hearing on March 5, 2002, which resulted in my writing a letter dated that day clarifying what I understand the evidence would show. In that letter, it is stated that we received final word on the IDPA policy from Steven Bradley, the head of the Bureau of Comprehensive Health Services. I have asked Investigator Gilvey to determine if the word from

> Bradley was oral, or in writing. I will let you know when he gets back to me.

It is clear from the correspondence between the parties that the issue regarding the method by which IDPA paid was discussed by the parties contemporaneously with the entry of the plea.

The Defendant next contends that a charge of Medicaid fraud cannot be based on the violation of an informal policy that has not been formally adopted as a regulation. The Defendant claims this policy requiring patients to be physically present each month for the orthodontist to be eligible for the remaining payments exists only in correspondence from the U.S. Attorney's Office to counsel for the Defendant. Accordingly, it cannot form the basis for his guilty plea. The Defendant asserts that at the very least, his interpretation of what the rules required was a reasonable one.

The Government disputes the Defendant's assertion it had informed him that it would provide counsel with some "law" demonstrating that IDPA employed a "fee for service" procedure. Rather, its letters to the Defendant's counsel were intended to confirm previous conversations and provide information that had been requested. The Government alleges the Defendant has produced no correspondence wherein he demanded, or the Government promised, any law in support of the plea. The Government also contends the Defendant has argued alternatively that he learned he was operating under a bundled fee billing procedure both before and after the entry of his guilty plea.

The Government also notes that the Defendant was indicted for, and pled guilty to, a massive scheme to defraud IDPA, wherein he submitted claims for orthodontic services provided to children which he did not actually provide. The Government claims that the indictment alleges abroad scheme which occurred over a seven-year period, and only

certain examples in which checks were mailed to the Defendant in furtherance of the scheme are included. The Government further asserts that because the requirement that the mail need only be "in furtherance" of the scheme to defraud is easily satisfied, it has not listed every fraudulent check or every fraudulent claim.

After carefully considering the argument of the parties and the entire record, the Court rejects the Defendant's argument that he was permitted to bill Medicaid for services not performed pursuant to a bundled fee arrangement. It appears that the only basis for this argument is a policy statement found in a Dental Policy Clarification that has been disavowed, and of which the Defendant was aware at the time of the entry of the plea. The Defendant's argument is contradicted by the terms of the general handbook which was provided to individuals such as the Defendant who participated in the Illinois Medical Assistance Program. And the Defendant signed a document agreeing to comply with the terms of that program. This included an agreement "to bill the Department as stipulated in the applicable Medical Assistance Program Handbook(s)." The handbook provides that dental services are covered. Moreover, it provides that unkept appointments are not covered. Accordingly, there would be no payment from IDPA unless the Defendant provided a service.

The Defendant argues that the general principles noted in the previous paragraph apply only to those who practice medicine, and not those who practice dentistry. While most of the chapters in the handbook are divided according to the provider's practice, the first section covers "[g]eneral policy and procedures applicable to all participating providers." The basis of the Defendant's argument, therefore, that these principles did not apply to him, is unclear. The terms forbidding payment for unkept appointments clearly apply to all providers.

It is also worth noting that there does not appear to be any support in the record for the Defendant's assertion that counsel for the Government promised to provide his attorney with "law" demonstrating that IDPA operated under a fee for service procedure. The Government alleges that the Defendant's assertion is "recklessly false and is completely contradicted by the correspondence he attached to the original motion." After carefully reviewing the documents attached to the Defendant's motion to withdraw and other portions of the record, the Court agrees that there do not appear to be any documents containing a promise from the Government to supply the Defendant with legal authority concerning the billing issue. Perhaps the closest thing to such a promise is a passage from the June 21, 2002 letter, wherein counsel for the Government stated that he will inform the Defendant's attorney whether the word from Steven Bradley regarding the IDPA policy was oral or in writing. In the motion to withdraw his guilty plea, the Defendant states that he heard nothing more from the Government on that issue. However, this was not a promise to provide him with law supporting the indictment. There does not appear to be any evidence in the record supporting the Defendant's assertion that the Government promised to provide him with law demonstrating that IDPA utilized a fee for service procedure.

For the reasons herein given, it is clear that the IDPA does not pay for services with a bundled fee arrangement. Moreover, because the only statement indicating that it did pay in such a manner was provided to the Defendant before the entry of his guilty plea, there has been no change in circumstances which would justify allowing the Defendant to withdraw his guilty plea.

In its initial Order and Opinion denying the Defendant's motion to withdraw his guilty plea, the Court found that the Defendant had not presented a fair and just reason to justify

allowing him to withdraw his guilty plea. Nor has the Defendant's motion to reconsider provided the Court with a basis to recede from its prior ruling. None of the Defendant's arguments involve a claim of actual innocence. Accordingly, the Court will DENY the Defendant's motion to reconsider the Order and Opinion denying his guilty plea.

III. CONCLUSION

The Court finds no reason to depart from its earlier ruling denying the Defendant's motion to withdraw his guilty plea. Accordingly, the motion to reconsider that ruling is DENIED. This case will proceed to sentencing. Ergo, the Defendant's motion for reconsideration of the Order and Opinion denying the motion to withdraw his plea of guilty is DENIED. The Defendant's sentencing hearing is hereby scheduled for April 25, 2005at 2:30 p.m.

ENTER: December 8, 2004

FOR THE COURT:

s/Richard Mills

United States District Judge

E-FILED
Thursday, 26 May, 2005 02:39:00 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	No. 01-30110
	)	
SERGIUS RINALDI,	)	
Defendant	)	

ORDER

RICHARD MILLS, U.S. District Judge:

This case is before the Court on the Government's motion for a scheduling order and the Defendant's motion to continue his sentencing hearing.

Defendant Sergius Rinaldi's sentencing hearing is currently scheduled for June 6, 2005 at 2:30 p.m. The Government notes that the parties are attempting to determine a reasonable approximation of the value of services which were billed, but not provided. The Government states that it anticipates that the Defendant will be making new and novel arguments at his sentencing hearing. Accordingly, it asks that it be provided with a copy of any and all exhibits to be offered by the Defendant fourteen days prior to the sentencing. The Government agrees to provide the Defendant and the Court with a list of any witnesses it intends to call to support its request for the Court to depart upward from the sentencing guideline range.

In his motion to continue the sentencing hearing, the Defendant notes that the Court granted him permission to issue a subpoena for certain records held by the Illinois Department of Public Aid. The records were not received until April 25, 2005. The Defendant alleges that Defense experts have begun the process of analyzing and processing the records provided by IDPA that will result in their statistical analysis. The Defendant contends that this process may require six months of effort to interview an adequate number of individuals for the statistical study's validity.

The Government opposes the Defendant's request for a six-month continuance. In its response, the Government alleges that all of the information that the Defendant now seeks in doing a "statistical sampling" could have been gained from a true audit of the records which were in his possession on January 23, 2001, when a Grand Jury subpoena was served upon him for those records. The Government asserts that instead of complying with the subpoena, the Defendant removed the records and has either destroyed them or purposely kept them from the Defense team. The Government contends that the Defendant is the sole cause for the delay in this case.

The Government further alleges that the Defendant's purported justification for requesting the continuance is yet another attempt to delay the proceedings. Moreover, it is highly unlikely that the Defendant will be able to obtain significant information as to whether his former teenage patients received professional services from him on specific dates more than four years ago. The Government also contends that because of the nature of the Defendant's billing activities, the information obtained from interviews, without further corroborating records, would be unreliable. The Government claims, therefore, that it is unlikely that a continuance of an additional six months would be beneficial. The Government does not object to a short continuance of 3-

4 weeks to accommodate the schedule of counsel for the Defendant.

The Court recognizes the problems associated with the Defendant's attempts to ascertain the amount of loss by interviewing individuals about appointments from several years ago. However, the Court granted the Defendant permission to issue a subpoena containing information about former patients. The purpose of the subpoena was so that the Defendant would have information allowing him to contact the patients to determine the accuracy of the dates of service in the Defendant's billings to Medicaid.

The Defendant only recently obtained from IDPA the information allowing him to contact his former patients. Given its previous rulings regarding the issuance of the subpoena, the Court concludes that it is only fair that the Defendant should be given some additional time beyond the current date set for sentencing to consider the information which was obtained from IDPA. However, the Court agrees that a continuance of six months is too long. This continuance of three months will be the final continuance.

Ergo, the Defendant's motion to continue his sentencing hearing [d/e 138] is ALLOWED. The Defendant's sentencing hearing is hereby continued from June 6, 2005 to September 7, 2005 at 1:30 p.m. The Government's motion for a scheduling order [d/e 137] is ALLOWED. The parties are directed to provide to each another within fourteen days of the sentencing hearing witness lists, exhibit lists, and an outline of the evidence which they intend to present.

ENTER: May 25, 2005
FOR THE COURT:

s/Richard Mills
United States District Judge

E-FILED
Wednesday, 10 August, 2005
10:56:01 AM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	No. 01-30110
	)	
SERGIUS RINALDI,	)	
Defendant	)	

ORDER

RICHARD MILLS, U.S. District Judge:

This case is before the Court on the Defendant's motion to continue the sentencing hearing.

In an Order entered on May 25, 2005, the Court granted the Defendant's motion to continue and scheduled his sentencing hearing for September 7, 2005. At that time, the Court stated that the three-month continuance would be the final continuance. The purpose of the continuance was so that the Defendant could compile a statistical analysis of the loss amount. The Defendant has now requested a continuance of an additional three months.

In support of his motion, the Defendant alleges that between June 6, 2005 and June 20, 2005, DCFS officials prevented the Defense team from interviewing at least one of Dr. Rinaldi's clients who was under the age of 21. Consequently, the Defendant states that at least that two week delay in the interview process should not be attributable to him.

In further support of its motion, the Defendant states that one of his witnesses, Robert E. Chapman, M.D., will not be available until September 13, 2005, as Dr. Chapman will return from a Mediterranean Cruise on September 12. The Defendant alleges that Dr. Chapman is a crucial witness for the Defense with respect to the issue of mitigation and diminished capacity.

The Government opposes the Defendant's motion to continue, contending that he is the sole cause for the delay in this case. It alleges that a lengthy delay will not enable the Defendant to create a reliable statistical sampling to show an "actual" loss amount. The Government asserts that any data produced by the Defendant will likely be unreliable. Consequently, it is unlikely that another lengthy delay will be beneficial.

The Government further notes that the Court has already received and reviewed the report of Dr. Chapman, as well as the reports of other medical professionals in this case. The Government alleges, therefore, that the Court has all of the information it needs to determine to what extent the Defendant's claimed "diminished mental capacity" contributed to this offense.

In his reply, the Defendant alleges that the interview process is progressing reasonably well according to Dr. Thomas W. Langford, and that an appropriate sample of patient-visits could be achieved within twelve weeks. Moreover, the Defendant disputes the Government's assertion that he is the sole cause for the delay in this case.

The Defendant also claims that Dr. Chapman is a crucial witness for the purpose of mitigation. The Defendant alleges that if called to testify, Dr. Chapman would, in addition to reiterating his opinions about the Defendant's diminished capacity, comment on the reports of other evaluators. The Defendant contends that Dr. Chapman will testify as to why his view of the matter should be accepted and will note the

flaws in the reports of others holding a different view. For these reasons, the Defendant requests a continuance of twelve months and for the Court to make it possible for Dr. Chapman to testify.

For the reasons given in its previous Order, the Court declines to continue the sentencing hearing an additional three months. However, the Court will continue the hearing to the following week in order to accommodate the Defendant's witness.

Ergo, the Defendant's motion to continue [d/e 145] is ALLOWED. The sentencing hearing is hereby continued from September 7, 2005 to September 15, 2005 at 1:30 p.m.

ENTER: August 9, 2005
FOR THE COURT:

s/Richard Mills
United States District Judge

E-FILED
Wednesday, 07 September, 2005
02:17:27 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	No. 01-30110
	)	
SERGIUS RINALDI,	)	
Defendant	)	

OPINION

RICHARD MILLS, U.S. District Judge:

In an Opinion and Order entered on December 9, 2004, the Court denied the Defendant's motion for reconsideration of the Opinion and Order entered on February 27, 2003, wherein the Court denied the Defendant's motion to withdraw his plea of guilty. On August 23, 2005, the Defendant filed a motion to reconsider the Order of December 9, 2004. Upon reviewing the record, the Court finds no basis to depart from its prior ruling.

Ergo, the Defendant's motion for reconsideration [d/e 149] is DENIED. The Government's motion for leave to file exhibits conventionally and under seal [d/e 153] is ALLOWED.

ENTER: September 6, 2005
FOR THE COURT:

s/Richard Mills
United States District Judge

E-FILED
Friday, 09 September, 2005
02:53:55 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	No. 01-30110
	)	
SERGIUS RINALDI,	)	
Defendant	)	

OPINION

RICHARD MILLS, U.S. District Judge:

The Defendant's sentencing hearing is scheduled to commence on September 15, 2005 at 10:00 a.m. If the sentencing hearing takes more than one day to complete, the hearing will resume on September 16, 2005 at 10:00 a.m. The Court has received the Presentence Investigation Report prepared by the United States Probation Office and the sentencing memorandums prepared by the parties. This Order is designed to inform the parties how the Court expects the sentencing hearing to be conducted.

The Court notes first that the Government has indicated that it has no objections to the PSR.[1] The Defendant has reported five unresolved objections to the PSR. These objections pertain to, inter alia, the amount of loss as recorded in the PSR, and the Defendant's assertion that he should receive a downward departure pursuant to U.S.S.G. § 5K2.13 on the basis of his alleged diminished capacity.

Because the Defendant has proffered objections to the PSR, he will proceed first in presenting evidence. The Defendant's sentencing memorandum includes an outline of the evidence he expects to present. This evidence includes the testimony of several witnesses pertaining to the Defendant's alleged diminished capacity. These witnesses include: (1) Robert E. Chapman, M.D., SC; (2) George Athey, Jr., Ph.D., ABPP; and (3) Ronald Zec, Ph.D., ABPN, ABPP/ABCN, Associate Professor Clinical Neuropsychology. The Government asks the Court to bar the anticipated testimony of the medical professionals that the Defendant plans to present. The Government notes that the Court has received numerous medical reports in previous filings and has basically addressed the same issue in denying the Defendant's motion to withdraw his guilty plea and subsequent motions. The Government notes, however, that it plans to call Dr. Philipp Bornstein to testify if the Court allows the Defendant's medical testimony.

The Court will give the Defendant some latitude in presenting the medical testimony as to his alleged diminished capacity. However, the Defendant is reminded that the Court has already reviewed and is familiar with the

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[1] However, the Government states that it will be requesting an upward departure from the applicable advisory sentencing guideline range. The Government contends that the amount of loss seriously understates the Defendant's conduct in this case.

reports of these medical professionals. Accordingly, the testimony of these witnesses need not be particularly lengthy.

As for the amount of loss, the Defendant states that he will introduce evidence through the testimony of investigator Deb McGregor. The Defendant states that he will also present the testimony of Dr. Thomas Langford. Dr. Langford will testify regarding the Defendant's billing practices.

The Government states that as many as four witnesses may testify regarding the billing practices of the Defendant's orthodontic practice from 1994 through 2001. These witnesses include Judy Keran, Michele Good, Doris Schuh, and Gloria Craven. The Government alleges these witnesses will also testify regarding instructions from the Defendant pertaining to the billings. The Government further states that Susan Jackson will testify specifically as to her creation of Government's Exhibit A, as well as the source documents, which have been submitted to the Court in connection with the Government's sentencing memorandum.

Ergo, the sentencing hearing will be conducted in a manner consistent with this Order.

ENTER: September 8, 2005
FOR THE COURT:

s/Richard Mills
United States District Judge

E-FILED
Thursday, 20 October, 2005
12:32:49 PM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
vs.	)	No. 01-30110
	)	
SERGIUS RINALDI,	)	
Defendant	)	

OPINION

RICHARD MILLS, U.S. District Judge:

This case is before the Court following the sentencing hearing of Defendant Sergius A. Rinaldi.

The sentencing hearing in this case proceeded over the course of three days, concluding on October 18, 2005. The revised Presentence Investigation Report found the Defendant's total offense level to be 14 with a criminal history category of I, yielding a sentencing guideline range of 15 to 21 months. The Defendant proffered five objections to the PSR. The parties presented evidence on those objections.

I. The Defendant's Objections to the PSR

A.

First, the Defendant objects to paragraph 15 of the PSR, wherein Probation determined that the amount of loss in defrauding the Medicaid system for which the Defendant should be held accountable is $25,844.35. This amount was

based on information that Probation obtained from the U.S. Attorney's Office. This information was based on interviews with former employees, patients and guardians, and through various records that were maintained. The Defendant alleges that information obtained from the Illinois Department of Public Aid will support his objection.

The evidence presented at the sentencing hearing demonstrated that if anything, the amount noted in paragraph 15 was a conservative estimate of the overall loss. Because some of the records were apparently removed or destroyed by the Defendant, it is impossible to arrive at a precise figure. However, the Court found the testimony of former employees regarding the Defendant's billing procedures to be credible. Moreover, the testimony of Susan Jackson, who prepared a loss summary, was also helpful in determining the amount of loss. Accordingly, the Court DENIED the Defendant's objection to paragraph 15 of the PSR.

B.

Next, the Defendant objects to paragraphs 16 and 17 of the PSR. Paragraph 16 provides that the Defendant presented documents showing that certain services were provided to patients when the services had not been provided to the extent listed on the documents. Paragraph 17 provides that between January 23, 2001 and July 3, 2001, the Defendant removed records from his office that were responsive to a subpoena issued on January 23, in order to prevent federal investigators from obtaining the records regarding his billing practices. Specifically, on July 3, 2001, the Defendant was seen removing certain records from his office and placing them near a trash bin of a nearby McDonald's Restaurant, in anticipation of a search by federal agents that was to take place that day. This is the factual basis of Count 13.

According to the PSR, the Defendant objects on the basis that the documents removed were primarily personal

items not related to the investigation. However, the information contained in these paragraphs was admitted by the Defendant in the factual basis of his Plea Agreement and when he acknowledged his guilt at his change of plea hearing. Accordingly, the Defendant's objections to paragraphs 16 and 17 are DENIED.

C.

The Defendant also objects to paragraphs 20 and 21 of the PSR. Paragraph 20 provides that the Defendant willfully obstructed and/or impeded justice during the investigation by knowingly using false writings and documents during the course of and in response to an audit of his practice by IDPA. It further provides that the Defendant knew that services were not provided to patients to the extent indicated by documents which he presented. Paragraph 21 provides that as charged in Count 13, the Defendant removed records, including sign-in sheets and appointment books for the years 1995 through 1999, from his office in response to a subpoena. It further provides that the Defendant requested that certain patients sign forms showing their attendance for certain orthodontic sessions during the previous year, knowing that the patients did not attend those sessions.

According to the PSR, the Defendant objects to these paragraphs on the basis that he had no criminal intent and that he did not enter a plea of guilty to removing sign-in sheets and appointment books, and that he denied those allegations. The PSR notes that the Defendant acknowledged that he was guilty at his change of plea hearing. Count 13 provides that documents were removed in response to the subpoena. Moreover, while not specifically mentioned in the factual basis of the plea, Count 13 includes language about removing sign-in sheets and appointment books between 1995 and 1999. Moreover, United States District Judge Joe Billy McDade

found that the Defendant had removed sign-in sheets and appointment books when he was held in civil contempt and imprisoned on July 10, 2001.

To the extent that the Defendant argues that he lacked criminal intent based on his assertion that he suffers from Adult Attention Deficit Disorder, that argument was decided adversely to the Defendant when the Court denied his motion to withdraw his guilty plea and his subsequent motions to consider. Accordingly, the Defendant's objections to paragraphs 20 and 21 are DENIED.

D.

Next, the Defendant objects to paragraph 94 of the PSR. That paragraph provides that an upward departure may be warranted in this case pursuant to U.S.S.G. § 2B1.1, comment n. 19, on the basis that the loss calculated in this case may understate the seriousness of the offense, given that all of the records were not able to be obtained because of the Defendant's actions.

According to the PSR, the Defendant objects on the basis that he should not be held accountable for an imaginary loss or a loss based on speculation. Pursuant to United States v. Booker, U.S., 125 S. Ct. 738 (2005), the Defendant contends that the appropriate standard for resolving factual disputes such as this is beyond a reasonable doubt. Additionally, the Defendant alleges that the statistical analysis of Dr. Thomas Langford and Deb McGregor will provide an accurate loss assessment. The Court considered the testimony of Dr. Langford regarding the Defendant's billing practices. Because of the passage of time and the loss of records, however, that testimony was of limited probative value.

While the Court has the discretion to depart upward, the PSR does not recommend an upward departure. Moreover, it is difficult to know the extent of the Defendant's fraud scheme, mainly because of his own actions.

To the extent that the Defendant objects to the Government's right to argue that an upward departure is appropriate, that objection is DENIED, on the basis that the Government is entitled to argue that the loss calculated may understate the seriousness of the offense. However, the Court declines to depart upward in this case.

E.

The Defendant's final objection concerns his request for a downward departure. He contends that he should receive a downward departure from the applicable guideline range on the basis of diminished capacity. The Court received the reports of several medical and psychological professionals. These reports, which were initially submitted when the Defendant sought to withdraw his guilty plea, were carefully considered by the Court. Additionally, Robert E. Chapman, M.D., SC and George Athey, Jr., Ph.D., ABPP testified on behalf of the Defendant at the sentencing hearing. The Government presented the testimony of Philipp Bornstein, M.D., FAPA.

The PSR notes that some of the psychological professionals who have evaluated the Defendant have opined that he does suffer from some diminished capacity. U.S.S.G. § 5K2.13 provides that a downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.

After considering the evidence and the testimony, the Court was unable to conclude that the Defendant suffers from a significantly reduced mental capacity which contributed substantially to the commission of the offense. The testimony of Dr. Bornstein was particularly probative on this issue. Dr. Bornstein opined that while the Defendant may suffer from a mild cognitive decline associated with aging, he does not and did not between 1994 and 2001 have

a significantly reduced mental capacity. This testimony was helpful in part because Dr. Bornstein's opinions regarding the Defendant's mental capacity were not inconsistent with the testimony of the Defendant's former employees.

Because the Court is unable to conclude that the Defendant has a significantly reduced mental capacity which contributed substantially to the commission of the offense, the Defendant's objection that he is entitled to a downward departure under § 5K2.13 is DENIED.

II. The Government's Motion for an Upward Departure

The Government moved for an upward departure in this case. Contending that the findings in the PSR do not reflect the seriousness of the offense, the Government requested an upward departure of 8 additional levels. The Government contended that such a departure is particularly appropriate because the Defendant's own conduct is why an accurate amount of loss cannot be ascertained. Moreover, the Sentencing Guidelines do not contemplate obstruction of justice to the degree that is present in this case. The Court declined to grant the Government's motion for an upward departure. While there is little doubt that the amount of loss is significantly higher than the amount for which the Defendant was held accountable, the Court was reluctant to lengthen the Defendant's prison term based on speculation. Accordingly, the Government's motion for an upward departure is DENIED.

III. The Defendant's Sentence

Based on the foregoing, the Court concluded that the Defendant's Sentencing Guideline range is 15 to 21 months imprisonment, as determined in the PSR. The Defendant was sentenced to serve a term of 21 months imprisonment on Counts 1 and 13, to be served concurrently. Restitution in the amount of $25,844.35 is mandatory and due immediately. A fine of $500,000.00, which included $250,000.00 on Count 1

and $250,000.00 on Count 13, is due immediately. While the guideline provisions called for a fine of between $4,000.00 to $40,000.00, the Court concluded, pursuant to 18 U.S.C. § 3553(a)(6), that a fine within that range would not adequately reflect the seriousness of the offense or provide just punishment for the offense.

Following the imposition of sentence, the Defendant moved for release on bail pending appeal. The Court DENIED the Defendant's motion on the basis that it was unable to find, pursuant to 18 U.S.C. § 3141(b)(1)(B), that an appeal would present a close question likely to result in a reversal.

The Defendant also requested that he be allowed to self report to the facility designated by the Bureau of Prisons. The Court ALLOWED this motion. The Defendant will report to the facility designated by the Bureau of Prisons on the date designated by the Bureau of Prisons. The conditions of bail will remain in effect until the Defendant reports to prison. One additional condition of bail is that the Defendant is to have no contact with former patients or with former employees who have testified or participated in the investigation.

Ergo, the Defendant's objections to the PSR are DENIED. The Defendant's motion for a downward departure is DENIED. The Government's motion for a downward departure is DENIED. The Defendant is hereby sentenced to serve a term of 21 months on Counts 1 and 13, to be served concurrently, in the custody of the Bureau of Prisons. The Court hereby recommends to the Bureau of Prisons that the Defendant serve his sentence in a facility as close to Edwardsville, Illinois as possible. Upon release from imprisonment, the Defendant shall be placed on supervised release for a period of three years on Count 1 and three years on Count 13, to be served concurrently. Restitution of $25,844.35 is payable and due immediately, as provided in

the judgment to be entered in this case. A fine of $500,000.00, which includes $250,000.00 on Count 1 and $250,000.00 on Count 13, is due immediately. The special assessment of $200.00, which includes $100.00 for each count, is mandatory and due immediately. The Defendant is further sentenced as provided for in the judgment to be entered. The Defendant's motion for release on bail pending appeal is DENIED. The Defendant's motion to self-report for the service of his sentence is ALLOWED. The Defendant will report to the facility designated by the Bureau of Prisons on the date designated by the Bureau of Prisons. The Government's motion to dismiss Counts 2-12 is ALLOWED.

ENTER: October 19, 2005
FOR THE COURT:

s/Richard Mills
United States District Judge

ACCESS TO DENTAL CARE FOR LOW-INCOME CHILDREN IN ILLINOIS

Illinois Center for Health Workforce Studies

Gayle R. Byck
Hollis J. Russinof
Judith A. Cooksey

December 2000

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This report was prepared by: Gayle R. Byck, PhD, Hollis J. Russinof, MUPP, and Judith A. Cooksey, MD, MPH

We would like to acknowledge the research assistance of Terri Febbraro, Louise Martinez and Catherine McClure.

Illinois Center for Health Workforce Studies

University of Illinois at Chicago
850 West Jackson Boulevard
Suite 400
Chicago, Illinois 60607
www.uic.edu/sph/ichws

December 2000
Funding was provided by the Health Resources and Services Administration, Bureau of Health Professions and Bureau of Primary Health Care, and in collaboration with the Illinois Primary Health Care Association

EXECUTIVE SUMMARY

While children's oral health has improved over the past forty years, many children have inadequate dental care. In the last several years, national attention has focused on the problem of limited access to dental care for low-income children. The causes of low access to dental care are complex. The lack of dentists willing to provide care to children with Medicaid has been called the most significant barrier to dental care. Most states are taking steps to expand dentists' participation, with the expectation that this will increase the number of children treated.

This situation prompted the Illinois Center for Health Workforce Studies (Center) at the University of Illinois at Chicago (UIC) to conduct a study of access to dental care for Illinois low-income children. This study was a collaborative effort of the Center and the Illinois Primary Health Care Association (IPHCA). Data were obtained from the American Dental Association, the Illinois Department of Public Aid (IDPA), and Doral Dental Services of Illinois (Doral). Funding for the study was provided by the Bureau

of Health Professions and the Bureau of Primary Health Care of the Health Resources and Services Administration.

The study was conducted as three components:

- a description of the supply, distribution, and characteristics of Illinois dentists, using ADA data.
- an analysis of Medicaid children's dental services for the 12-month period of March 1999 through February 2000; data for this analysis were provided by IDPA and Doral. This analysis describes the dental care expenditures and dental care utilized by children enrolled in the Illinois Medicaid program (this includes all children enrolled through Medicaid and the State CHIP program, KidCare). The dentists' participation in Medicaid, through enrollment numbers and care provided, is also described. Since one of the original study goals was to assess the capacity of Illinois dentists to provide care to Medicaid children, this component concludes with three scenarios that estimate the numbers of participating dentists needed to provide care to various target numbers of children.
- an analysis of steps taken by Illinois and six surrounding states to address the problems of low access to dental care for children with Medicaid.

The findings of this study demonstrate relatively low utilization rates for dental care among Illinois children with Medicaid and limited levels of Medicaid participation by Illinois dentists. The data are presented for Illinois as well as for seven regions of the state. The key findings an: summarized here:

- Statewide, 33% (271,152) of children enrolled in Medicaid or KidCare utilized dental care during the year. Illinois children in the 4-5 and 6-12 year-old age groups had the highest proportion visiting a dentist in the year (about 50%). The very young children (under three years of age) and adolescents had lower utilization rates. While

38% of enrolled children in Cook County visited a dentist, the remainder of the State was below 30%.

- Total dental claims expenditures were $29.17 million; the average expenditure per user was $108.
- 34% (2034) of active general and pediatric dentists were enrolled in Medicaid. Of enrolled dentists, 25% did not participate at all during the year, 39% submitted 1-100 services, 28% submitted 101-999 services, and 8% submitted 1,000 services or more.
- The population-to-dentist ratios can be interpreted to mean, at the state level, that at 57% utilization by Medicaid/KidCare enrolled children, each of the 2,034 enrolled dentists would need to treat 229 children, or each of the 1,537 participating dentists would need to treat 304 children; at two visits per child per year, these numbers would represent substantial percentages of a dental practice' s visits. Currently, only 165 dentists provided at least 1,000 services during the year (treating an estimated 185 children at an average of 5.4 services per dental service user).
- The regional variation in both Medicaid children's utilization and enrollment and participation of dentists underscores the importance of examining access and workforce issues at small geographic levels.
- All seven states have undertaken a number of recent initiatives to address the problem of access to oral health care for Medicaid-enrolled children. Each state has formally acknowledged the problem through the formation of an advisory committee or task force. The most common changes in state programs and policies focused on increasing private practice dentist participation. However, in spite of the numerous and varied measures taken by these states, all seven states

reported on-going problems with access to oral health care for low-income children.

Based on our study and on discussions with groups in Illinois, the following recommendations were made; they are discussed in greater detail in the report:

- Policy Recommendation 1: More dentists should be recruited to enroll in the Medicaid program. Efforts should be made to increase the number of children treated by currently enrolled dentists. This recommendation includes discussion of: adequate reimbursement rates; outreach to enroll new dentists in Medicaid; increasing participation levels of currently participating dentists
- Policy Recommendation 2: Consider options to increase the dentist supply in underserved areas of Illinois.
- Policy Recommendation 3. Explore the feasibility of maintaining or expanding the capacity of dental clinics known as safety net providers, such as community health centers, local health departments and others.
- Policy Recommendation 4. Encourage the integration of oral health care with primary health care.
- Policy Recommendation 5. Enhance dental school training to include population-based studies of oral and dental disease among the high-risk groups, the problems with access to dental care, and public health dentistry. Expose dental students to community based private practices and safety net clinics where high-risk children are receiving care.
- Policy Recommendation 6. Expand the role of dental hygienists in the care of Medicaid children.
- Policy Recommendation 7. Establish a statewide oral health surveillance system.
- Policy Recommendation 8. Expand community based preventive programs.

This study provides detailed information on the status of children' s dental services - utilization and provider participation - in the Illinois Medicaid program during the study year. It also provides scenarios for projecting the capacity of dentists to treat Medicaid enrolled children under various scenarios. It is hoped that the information presented here will contribute to a clearer understanding of access to dental care for low-income Illinois children as well as to dental workforce supply and planning. Further research on the role of safety net dental clinics in expanding access to dental care for low-income children, and on the characteristics of dentists who participate in the Medicaid program, would add to our understanding of how to address problems with access to dental care for low-income children.

Table 15: Total Expenditures and Number of Services by Procedure Category, Illinois Medicaid Children's Dental Services (follows)

Table 15

Procedure Category	Total Expenditures	No. of Services	Avg. Paymt./Procedure
Diagnostic	$5,333,740	430,873	$12.34
Preventive	$7,501,193	425,859	$17.61
Restorative (fillings)	$7,951,737	208,595	$38.12
Restorative (other)	$712,151	14,093	$50.53
Endodontic	$1,325,671	17,166	$77.23
Periodontics	$41,434	487	$85.08
Removable prosthodontics	$50,058	173	$289.35
Implants, fixed prosthodontics	$23,940	160	$149.63
Oral surgery	$1,637,302	56,821	$28.81
Orthodontics*	$413,414	n/a	n/a
Miscellaneous	$186,601	8,553	$21.82
FQHC Encounter Fee	$961,638	18,330	$52.46
EPSDT	$3,020,812	282,017	$10.71
TOTAL	$29,159,690	1,468,133	$19.86

Source: Illinois Department of Public Aid, 2000.

*** Orthodontics are most often billed by the case, in monthly installments over the course of treatment.**

Total expenditures by procedure category, by age group. Spending by procedure category included 18% on diagnostic, 26% on preventative, and 30% on restorative care services (Table 16). However, these estimates provide an incomplete picture of the total expenditures on these services since EPSDT includes diagnostic and preventive services, and FQHC includes a variety of service types. Differences in types of services used by different age groups can also be seen in Table 16. For the children under 13 years of age, most of the services fell under the preventive, diagnostic, restorative, and EPSDT categories. As age increased, restorative (fillings) accounted for a greater proportion of service,. as did oral surgery for the oldest group of adolescents.

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Appendix A

Illinois Center for Health Workforce Studies
Dental Advisory Group - Members & Invited Guests

Diann Bomkamp. RDH, BSDH
ADHA District VIII Trustee
American Dental Hygienists' Association

Ann Boyle, DMD, Associate Dean
School of Dental Medicine
Southern Illinois University

Gerald Ciebien, DDS, MPH
Chairman, Access to Care Committee
Chicago Dental Society

Shelly Duncan, Vice President
Community Health Services
Illinois Primary Health Care Association

Patrick Ferrillo Jr., DDS
Dean, School of Dental Medicine
Southern Illinois University

Robyn Gabel. MSPH, MJD
Executive Director
Illinois Maternal & Child Health Coalition

Steve Geiermann, DDS
Regional Dental Consultant
Bureau of Primary Health Care
Health Resources and Services Administration

Julie Janssen, RDH, MA
Public Service Administrator
Division of Oral Health
Illinois Department of Public Health

Greg Johnson, Director
Professional Services
Illinois State Dental Society

Lewis Lampiris, DDS, MPH
Chief, Division of Oral Health
Illinois Department of Public Health

Ann Lattig
Senior Public Service Administrator
Bureau of Comprehensive Health Services
Illinois Department of Public Aid

Pat Law, Manager
Bureau of Comprehensive Health Services
Illinois Department of Public Aid

Henry Lotsot, DDS
Vice President
Doral Dental Services of Illinois

Tim Lynch, Manager
Governmental Affairs
American Dental Hygienists Association

Laura Neumann, DDS, MPH
Group Associate Executive Director
Professional Services
American Dental Association

Matt Powers, Administrator
Division of Medical Programs
Illinois Department of Public Aid

Indru Punwani, DDS, MSD
Head, Pediatric Dentistry
University of Illinois at Chicago

Mark Rosenberg, MD, FAAP
President, Illinois Chapter
American Academy of Pediatrics

Mary Catherine Ring, Chief
Center for Rural Health
Illinois Department of Public Health

Maria L.S. Simon. DDS, MS
President, Illinois Society of Pediatric Dentistry
Pediatric & Adolescent Dental Associates

Dave Spinner, Manager
Medical Assistance Dental Program
Illinois Department of Public Aid

Rodney Vergotine, DDS
Undergraduate Clinic Director
College of Dentistry
University of Illinois

Debra Whitmer, President
Illinois Dental Hygienists' Association

Staff

Gayle Byck, PhD
Senior Research Specialist
Illinois Center for Health Workforce Studies
University of Illinois at Chicago

Judith Cooksey, MD, MPH, Director
Illinois Center for Health Workforce Studies
University of Illinois at Chicago

Julie Mansour, MBA, Analyst
Illinois Center for Health Workforce Studies
University of Illinois at Chicago

Hollis Russinof, MUPP
Center-Manager & Policy Analyst
Illinois Center for Health Workforce Studies
University of Illinois at Chicago

Appendix B: Data Sources and Methods

This appendix describes the data sources for the first two study components: (1) describing the supply and distribution of Illinois dentists; and (2) describing dental expenditures, children's utilization of dental services, and dentists participation in the Medicaid program. In addition, some comments on the methodology are provided: further details on methodology are available from the Center upon request. The methods for the study component which assessed the problems and strategies in seven Midwestern states are described in that section of the report.

Data Sources

Sociodemographic data on Illinois dentists

A data set of all Illinois dentists was obtained from the American Dental Association (ADA) in February 2000. This data set included both ADA members and non-members. The data set included: address information including zip code, birth date, gender, race, year of graduation from dental school, dental school attended, specialty, and occupation type (e.g. private practice>30 hours per week, hospital dentist, etc.). The only information with a large proportion of missing values was race (28% missing for active dentists).

Zip codes matched to counties

A data set from the United States Postal Service (USPS) was purchased which listed all zip codes and their corresponding county and state (USPS, 2000). The Illinois zip codes and counties were extracted and merged with the ADA file to add county information for each dentist. It should be noted that an exact zip code to county match was not feasible as some zip codes cross county lines, and zip code boundaries do change. It is believed that this limitation does not have a significant impact on the study results.

County population estimates

Population data, total and children <18, for each county was obtained from the Population Estimates Program. Population Division, U.S. Census Bureau. (CO-99-13) Population Estimates for Counties by Age Group: July 1, 1999. Internet release data: August 30. 2000.

Dentist enrollment and participation in Medicaid: and Medicaid/KidCare enrollee utilization of dental care

Data on dentist enrollment and participation in Medicaid, Medicaid/KidCare enrollee utilization of dental care, and procedures performed were provided by the Illinois Department of Public Aid (IDPA) and Doral Dental Services (Doral), the state's Medicaid dental intermediary. Except for Medicaid/KidCare enrollment and provider enrollment, all data were for services provided from March 1, 1999 through February 29, 2000, for claims paid through June 30, 2000. Medicaid/KidCare enrollment figures were as of September 1, 1999 (the midpoint of the claims data provided). The list of enrolled providers was dated June 30, 2000. Table B-1 below shows a list of all data files received from IDPA.

No. 05-4113

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.
SERGIUS RINALDI,
Defendant-Appellant

Appeal From The United States District Court
For the Central District Of Illinois (Springfield Division)
Case N. 01-30110
The Honorable Judge Richard Mills

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT, SERGIUS A. RINALDI

ORAL ARGUMENT REQUESTED

Thomas M. Dawson
230 S. Fourth Street
Leavenworth, KS 66048
913-682-5331
Fax. 913-682-8363
dawsonlaw@aol.com
Attorney for the Defendant-Appellant,
Sergius Rinaldi

proven the defendant's guilt. Diminished capacity is a viable defense when specific intent is an element of the charged offense. The charges sub judice are specific intent crimes. Inadvertent, negligent or reckless actions or actions lacking the requisite criminal intent fail to prove specific intent. The medical evidence supports the Appellant's claim.

ISSUE 2.: The District Court erred in denying the Appellant's motions to withdraw his plea of guilty where the Appellant presented claims of actual innocence that the fee system was pro rated and therefore the date of service was immaterial; that the Appellant's interpretation of the policies and regulations was consistent with the Manager of the Dental Program for IDPA and consistent with an array of notables, consistent with other billing systems for other insurance companies and other Government programs and that the Appellant's reasonable interpretation of the policies and regulations had not been clearly refuted during the indictment period, hence there was no criminal intent; that the regulations and policies relating to the pro rated vs. fee for service system were ambiguous to a degree that a criminal charge could not be supported.

STANDARD OF REVIEW: The standard of review for determining whether the Court below erred in denying the motion to withdraw the plea of guilty is abuse of discretion. *U.S. v. Comez-Orozco,* 188 F. 3^{d} 422 (1999).

DISCUSSION:

Illinois Department of Public Aid

AGREEMENT FOR PARTICIPATION IN THE ILLINOIS MEDICAL ASSISTANCE PROGRAM

WHEREAS, s/Dr. Sergius A. Rinaldi, DMD, MS, PC, Full Legal as well as any Assumed (d.b.a.) name, (IDPA Provider Number, if applicable) hereinafter referred to as "the Provider", is enrolled with the Department of Public Aid hereinafter referred to as "the Department", as an eligible provider in the Medical Assistance Program; and

WHEREAS, the Provider wishes to submit claims for services rendered to eligible Public Aid clients;

NOW THEREFORE, the Parties agree as follows:

1. The provider agrees, on a continuing, basis, to comply with all current and future program policy provisions as set forth in the Applicable Department of Public Aid Medical Assistance Program handbooks. The Department shall notify the provider of changes in policy 30 days before the effective date of the change unless there is an emergency, as defined in the Administrative Procedure Act, or the change is to comply with State or Federal law or regulation.
2. The provider agrees, on a continuing basis, to comply with applicable licensing standards as contained in State laws or regulations. Hospitals are further required to be certified for participation in the Medicare Program (Title XVIII); if not eligible for or subject to Medicare certification, must be accredited by the Joint Commission on the Accreditation of Healthcare organizations.
3. The provider agrees to comply with Title VI of the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 and regulations promulgated thereunder which prohibit discrimination on the grounds of sex, race, color, national origin or handicap.

4. The provider agrees, on a continuing basis, to comply with Federal standards specified in Title XIX of the Social Security Act, and also with all applicable Federal and State laws and regulations.
5. The provider agrees that any rights, benefits and duties existing as a result of participation in the Medical Assistance Program shall not be assignable without the written consent of the Department.
6. The provider shall receive payment based on the Department's reimbursement rate which shall constitute payment in full. Any payments received by the provider from other sources shall be shown as a credit and deducted from charges sent to the Department.
7. The Provider agrees to be fully liable for the truth, accuracy and completeness of all claims submitted electronically or hard copy to the Department for payment. Furthermore, the provider agrees to review, affix an original signature, and retain in their files, the Billing Certification which is the last page of the Remittance Advice. Any submittals of false or fraudulent claim or claims or any concealment of a material fact may be prosecuted under applicable Federal and State laws.
8. The Provider agrees to the provisions below and shall furnish to the Department or its designee upon demand: all records, and signed Billing Certification(s) associated with submitted claims necessary to disclose fully the nature and extent of services provided to individuals under Articles V, VI, and VII of the Public Aid Code; maintain said records for not less than three (3) years from the date of service and maintain the Billing Certification for three (3) years from the voucher date to which it relates or for the time period required by applicable Federal and State laws, whichever is longer. If a Department audit is initiated the Provider shall retain

all original records until the audit is completed and every audit issue has been resolved, even if the retention period extends beyond the required period.

AFFADAVIT

State of Illinois, Sangamon County, ss.

I, Deb McGregor, of lawful age, do solemnly swear that the following facts are true and correct to the best of my knowledge and belief:

1. That I am a private investigator in the employ of the Defense team for Dr. Sergius Rinaldi.

2. That on April 8, 2005, April 11, 2005, and April 26, 2005, I met with Mr. Dave Spinner, Manager, IDPA Dental Program.

3. Shortly after each meeting I created a memo reporting the conversations I had with Mr. Spinner.

4. The three memos are attached hereto and are true and accurate to the best of my memory and knowledge.

5. I swear to the accuracy of these memos as if they were restated within this affidavit.

s/Deb McGregor

BE IT REMEMBERED, that on this 18th day of August, 2005, before me, a notary public in and for the county and state aforesaid, came Deb Mcgregor, who is personally known to me to be the same person who executed the foregoing instrument of writing and said person acknowledged the execution of the same as her voluntary act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

My appointment expires: 10/7/06

s/Ronda L. Anders, Notary Public

Official Seal
Ronda L. Anders

ONSITE INVESTIGATIONS & ILLUSTRATIONS
8645 Frey Road, Pleasant Plains, Illinois 62677
Phone/Fax: (217) 626-1330
E-mail: OnSiteInc02@aol.com

MEMO

Date: April 8, 2005

To: Tom Dawson

From: Deb McGregor

Subject: Meeting with David Spinner 10:30 am to 11:09am

On April 8, 2005 I met with David Spinner and after identifying myself and the reason for the meeting, Mr. Spinner agreed to talk to me. I told Mr. Spinner I wanted to ask about policy clarification and related questions. On **several occasions** during this meeting Mr. Spinner stated, "I don't know if I should be talking to you about anything, it is probably not a good idea at this point." I advised Mr. Spinner he could stop speaking to me at any point and could respond to any of the questions he was comfortable with.

During the conversation Mr. Spinner stated he did not know anything about Dental Policy Clarification or any related articles he may have been alleged to author. The following are the responses to the questions I asked:

1. Section A 1-4 had no knowledge. 5. Mr. Spinner states since 1984 it has been a pay by fee schedule for Doral and Delta based on procedure code. It is not correct, patient must be seen. It is the Dentist/Orthodontist responsibility to let the provider or I.D.P.A. to know if the patient during treatment misses more than two monthly visits. Their policy is based on seeing the clients, always has been. We operate by the office reference manual only. He has no knowledge of medical benefits or how they are billed or paid.
2. Section B-1 no answer.

3. Section B-2 As dental unit manager, Mr. Spinner stated his responsibilities were to over see the reference manual. The reporting relationship between Mr. Spinner and Mr. Bradley is Bradley is Spinner's boss, bureau chief. His only authority is what is contained in the reference manual. His interpretations of policy are binding and can only be over ridden by the director.
4. Number 3 of Amy Woodhall document, The dental policy was always circulated for internal review only. The public is never involved in this process. Internally the involvement would have been me, Bradley, Doral, Delta and the policy review committee, which consists of 12 to 13 Dentists. Mr. Spinner stated he did not know the names of the Dentists involved but would have record of it. I asked if he would be willing to provide the names and he stated "not at this point".
5. Number 4 of Woodhall document, He did not know about Sec.103 squaring anything. It is against Federal and State Policies to bill for missed appointments. It is fraud to bill as such. There is no exception for orthodontic dental care. Orthodontic services are not treated differently, everything is fee for service. There is a two month window for missed visits for patients that are in active treatment, the orthodontist must notify the provider or I.D.P.A. of missed visits.
6. Number 5 of Woodhall document. Denies knowledge of Policy clarification.
7. Number 6 in response to the portion Knowing whether IDPA has received any federal policy interpretations from CMS on the "unkept appointment." Not that I know of, if there is any it has not been passed on to me. **Basically, if it is not in the reference manual it would not be official. This manual is the "bible".**

I asked Mr. Spinner if he would be willing to talk to me again in the future should I have further questions on clarification and he said he would be willing to.

ONSITE INVESTIGATIONS & ILLUSTRATIONS
8645 Frey Road, Pleasant Plains, Illinois 62677
Phone/Fax: (217) 626-1330
E-mail: OnSiteInc02@aol.com

MEMO

Date: April 12, 2005

To: Tom Dawson

From: Deb McGregor

Subject: Meeting with David Spinner 3: 15pm to 4:07pm

On April 11, 2005 I met with David Spinner and showed him the documents 1025 and 1026. He immediately responded, now I know what you are talking about, this is wrong, absolutely wrong. I asked him what he meant and he said he had made an error. During our conversation on several occasions he stated he was in error, he was wrong. I then began asking him the following questions:

Q. It is a clarification indicating there is confusion in March 2000.

A. Yeah, I guess it was put together based on an office reference manual and questions being asked. It was wrong.

Q. It directs questioners to the Manual for answers.

A. The questioners were the internal auditors who did not have knowledge of what was in the office Manual.

Q. It shows bundling based on monthly adjustments of $78.13 for the remaining balance of $1795.00.

A. Again, it was clarification for the internal auditors.

Q. It shows bundling based on monthly adjustments of $78.13 for the remaining bal. of $1,795.00.

A. Yes, correct on the monthly adjustment, but bundling is never used, it is the wrong term. You have to submit the appropriate code for billing and the patient must be seen to get payment. It has always been that way.

Q. It implies payments are not fee for service but based on prorations.

A. Simply put, don't bill if you haven't seen them. The bill has to be for the date of service.

Q. Was a clarification necessary because there was confusion? Who was confused? and what were they confused about?

A. The clarification was for the internal auditors. They did not know policy and thought the manual was not specific enough.

Q. What is the policy basis for monthly adjustments?

A. It has to be a face to face visit, you have to be seen to bill.

Q. What evidence supports that policy?

A. It's in the office reference manual.

Q. Did IDPA look at total cost for treatment as 2,500.00 and then prorate to set reimbursement rates?

A. After the initial consult, installation and such, the monthly adjustments are then prorated.

Q. The policy clarification is dated March 2000, where was it prepared?

A. In my office, of course.

Q. Was it ever changed?

A. **It was changed because it was wrong!**

Q. When and how was it changed?

A. It was changed in April of 2000 by Bradley and Doral, it was changed because it was wrong.

Q. Was it first disavowed in March 2000? If so, how was the policy further clarified? *(i.e.;* written, verbal and what were the additional clarifications?

A. The revision to the March 2000 was probably done in April 2000 and the revision was **specifically for**

question 4. The clarification was done by Bradley and Doral. I am not sure if it was verbal or written communication by Bradley. I am not aware if it was done in writing, I was not given a copy.

Q. Was the author ever told that he was "simply wrong"?

A. Yes. I am the author and I was wrong, I was told that by Doral and Bradley.

Q. How was the policy manual distributed and to whom?

A. To Bradley and the internal auditors, not externally.

Q. Did Doral and Delta ever get a copy?

A. I didn't ask about it, I really don't know, if they did I didn't send it.

Q. Did dental providers get a copy or just called if they had questions?

A. No, they did not get a copy.

ONSITE INVESTIGATIONS & ILLUSTRATIONS
8645 Frey Road, Pleasant Plains, Illinois 62677
Phone/Fax: (217) 626-1330
E-mail: OnSiteInc02@aol.com

MEMO

Date: April 27,2005

To: Tom Dawson

From: Deb McGregor

Subject: Meeting with David Spinner

On April 26, 2005 at 9:54am I went to IDPA to speak with Dave Spinner. After waiting for approximately 15 minutes, Dave Spinner appeared. I asked Dave if he was able to speak to me and he appeared to be very agitated and was very abrupt in his response. He eventually calmed down, said that he was very busy, had a meeting and it was not a good time. He then suggested I could come back at 11:00am and he would try to see me.

At 11:00 am Dave Spinner met me in the lobby and agreed to talk to me. Dave also stated that he did not know why we were attacking him for an honest mistake in an inter-office memo from years ago. I explained that we were only trying to obtain information so that we understand policy and procedure. The questions asked and his response is as follows:

Q. Has policy changed in regards to billing procedures over time?

A. No, the only change *is* that there has been some increase in fees paid for the services. It is and has always been a pay for service. If you don't see them you don't get paid.

Q. Is it possible to get a copy of the office reference manual that you often refer to as the "bible"?

A. Yes, I believe I can get that for you, it may take a day or so and I will call you so that you can come pick it up at

the desk. That manual is called the DORM, Dentist Office Reference Manual.

Q. Is that the same manual that is sent to dental providers or is that for internal use only?

A. Yes, it is the exact same one that the providers get, it is the only one. It contains dental information only.

Q. Are there changes made to the manual every year or has it remained the same?

A. Oh yes, there are changes made every year. Especially after, I believe 2003, after the Rinaldi incident.

Q. Do you know what the changes were? Anything stick in your mind specifically?

A. Well, I do know that the area of "you must see the patient to get paid" was bolded and made clearer than it was. It was clear before but after that they made it clearer.

Q. Is it possible for me to get a copy of the manuals from 2000 to 2005?

A. The old manuals are not kept in paper form and it would be in the archives. It may be possible to get a copy but it would take a month or two. I will try to get something for you.

Q. Are you in the same position as you were in 2000? What is your job title now and then?

A. Yes, I am in the same position and the job classification is Manager of Dental Program.

Q. So I better understand what a provider is billing for, can I get a copy of the billing codes used to process claims?

A. Those would be in the Office Reference Manual, the one I will get for you.

Q. Who is the director of Dental Policy, in 2000 and now?

A. We don't have a director, they are called bureau chiefs

and that would have been Steve Bradley in 2000 and Kelly Carter since 2004.

Q. We discussed in our previous meetings Chapter 100, you advised me that was for medical only. (he is shaking his head yes) Is this chapter 100 given to dentists or orthodontists? Is it in the same manual you call the office reference manual?

A. No, the 100 only goes to medical providers. I think possibly a few may do **surgical procedures also, so they would get both 100 and 200 they are separate manuals**, not bound together. There is no reason that a dentist or orthodontist gets the medical manual otherwise. As I said, they are different manuals.

Q. Does an orthodontist get paid for the two missed visits we talked about in our previous meeting?

A. Yes, they would get paid, but after missing two visits the provider has to contact IDPA, Delta or Doral, which ever was processing the claim. Our thought on that is if they miss more than two they usually don't come back. The government wanted to go after Rinaldi for billing more than that but we adamantly stuck to the policy for payment for two missed visits. DCFS alerted us to the continued billing practices after the recipient didn't show for months, Rinaldi continued to bill sometimes for up to five years and the people had some real medical problems as a result of wires or braces being left on for so long. Continued billing is fraud. Rinaldi refused to provide documents for his audit and continued to bill fraudulently, he could have paid an extrapolated amount and this would have been done with.

Q. Have you ever met or spoken with Dr. Rinaldi?

A. No, I haven't.

Q. Are the policies and billing procedures for DCFS and IDPA the same?

A. No, DCFS is the referring agency they don't pay or bill for anything they refer to us. They send us the information and we determine if it fits our guidelines for treatment and payment.

Q. Have the policies changed for service, billing and payment as a result of the agency changes? (IOPA to Delta to Doral)?

A. No. they have been consistently the same over time.

At the end of our discussion I thanked Dave and gave him a business card, asking that he call me when the manuals were available for me to pick up. He agreed to call me.

No. 07-226

In the Supreme Court of the United States

SERGIUS A. RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in concluding that petitioner had not demonstrated a "fair and just reason," Fed. R. Crim. P. 11(d)(2)(B), to warrant withdrawal of his guilty plea before sentence had been pronounced.

2. Whether the imposition of a $500,000 fine, which was above the advisory-Guidelines range but within the statutory maximum, was impermissibly based on judicial factfinding.

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In the Supreme Court of the United States

No. 07-226

SERGIUS A. RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) appears at 461 F.3d 922. Two relevant earlier decisions of the court of appeals appear at 280 F.3d 1103 and 351 F.3d 285. The orders of the district court denying petitioner's motion to withdraw his guilty plea (Pet. App. A17-A29) and denying petitioner's motion to reconsider that order (Pet. App. A30-A47) appear, respectively, at 246 F. Supp. 2d 992 and 347 F. Supp. 2d 594.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2006. A petition for rehearing was denied on November 6, 2006. The petition for a writ of certiorari was filed on January 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, and obstruction of justice, in violation of 18 U.S.C. 1518. Pet. App. A1. The district court sentenced him to 21 months of imprisonment and imposed a fine of $500,000. *Ibid.* The court of appeals affirmed. *Id.* at A1-A16.

1. Petitioner is an orthodontist with two offices in central Illinois. Pet. App. A2. His patients included wards of the state under the protection of the Illinois Department of Children and Family Services (DCFS) and individuals who received Medicaid assistance through the Illinois Department of Public Aid (IDPA). *Ibid.* From 1994 to 2001, petitioner submitted claims for payment to these two state agencies; some of his claims were for services he had not rendered. *Ibid.*

2. In January 2001, petitioner received a grand jury subpoena for records about his billings, including his original case files and forms for certain patients, appointment books and logs, patient sign-in sheets, and records of cancellations. Pet. App. A2. When those records were not produced, the government presented evidence at a contempt hearing that petitioner had concealed the files and documents after receiving the subpoena, and the petitioner was found to be in contempt and ordered to be imprisoned and fined until the material was produced. *Ibid.* The court of appeals affirmed that ruling. See *In re Grand Jury Proceedings*, 280 F.3d 1103 (7th Cir. 2002).

3. On November 8, 2001, a federal grand jury in the Central District of Illinois indicted petitioner on 13 counts for "executing a scheme to defraud the Medicaid system in the state of Illinois and obstructing justice."

Pet. App. A2. During the course of pretrial discovery, the government provided petitioner with a document entitled "Dental Policy Clarification," which was a policy statement prepared by David Spinner, a contract administrator with the State of Illinois; it stated that a dentist may bill Medicaid for reimbursement under a "bundled fee," or flat-rate system, "whether he sees the patient or not." *Id.* at A9, A42.

In late February 2002, petitioner, with the aid of counsel, entered into a written plea agreement whereby he agreed to plead guilty to one count of mail fraud and one count of obstruction of justice. Pet. App. A2. On March 5, 2002, an amended plea agreement was filed that corrected some typographical errors. *Id.* at A17.

The government thereafter wrote a letter to defense counsel, dated March 5, 2002, explaining that the IDPA

> has disavowed [the Spinner] memorandum and clarified that in all instances, IDPA would deny payment for any claim for orthodontia service when a child is *not* physically present to receive the service. The "final" word on that subject came from Steven Bradley, the head of the Bureau of Comprehensive Health Services for IDPA. According to Mr. Bradley, that has always been the policy of IDPA and [Spinner] is simply wrong.

Pet. App. A9.

Later the same day, petitioner, with the aid of counsel, pleaded guilty at a hearing. Pet. App. A43. During the hearing, the prosecutor, Patrick Hansen, set forth the following factual basis for the plea:

> AUSA Hansen: Were the case to go to trial, your Honor, the Government would show that during the years 1994 through 2001, Sergius Rinaldi was an

> orthhodontist practicing from offices in Springfield and l Edwardsville, Illinois. Among his clients were warcds of the State of Illinois under the protection of the | [*sic*] or custody of the Illinois Department of Chilildren and Family Services, DCFS, as well as thosse receiving Medicaid assistance from the Illinois Depeartment of Public Aid, IDPA. During this period of t time, the Defendant would bill DCFS and Meddicaid for services regarding these patients which incluuded monthly adjustments to braces. Among the billss submitted to DCFS and IDPA were bills for servvices he did not perform including several of thesse monthly adjustments.
>
> TThe Government's evidence would also include at leasst two occasions when Dr. Rinaldi billed for puttingg braces on children which was not done by Rinaaldi.

Pet. Appp. A22-A23. The district court then engaged petitionerr in the following colloquy:

> TThe Court: Very well. Mr. Rinaldi, did you listen closeely?
>
> MMr. Rinaldi: Yes, I did.
>
> TThe Court: Did you understand Mr. Hansen's worcds?
>
> MMr. Rinaldi: Yes, I did.
>
> TThe Court: Were you following along as the Courrt was also following along in paragraph 16 of the ameended plea agreement?
>
> MMr. Rinaldi: Yes, I did.

The Court: Do you dispute, disagree with any of the statements made by Mr. Hansen?

Mr. Rinaldi: No.

The Court: Very well. Did you do what Mr. Hansen said you did?

Mr. Rinaldi: Yes.

The Court: Very well. From 1994 through 2001, were you an orthodontist in the Springfield and Edwardsville area, and did you have clients that were DCFS wards and Medicaid patients?

Mr. Rinaldi: Yes, I did.

The Court: As part of your duties as an orthodontist, do you have monthly—did you bill for monthly adjustments for braces?

Mr. Rinaldi: Yes, I did.

The Court: Did you also bill for actual braces being applied?

Mr. Rinaldi: Yes, I did.

The Court: As stated by Mr. Hansen, did you bill —through these two entities, did you bill for work that you did not perform?

Mr. Rinaldi: Yes, I did.

The Court: Specifically as to Count I, did you do the billing as specified, the billing of September 19th, 2000 monthly adjustment for work on August 9, 2000 for a patient with the initials that goes by JB, work that you did not perform?

Mr. Rinaldi: Best of my memory I did, yeah.

The Court: Very well. That claim would have been submitted through the U.S. mail?

Mr. Rinaldi: Yes.

The Court: That is the ordinary course of your business?

Mr. Rinaldi: Yes, uh-huh.

The Court: Very well. Would you have been paid by a check that would be sent through U.S. mail?

Mr. Rinaldi: Yes.

The Court: And submitted these claims you knew were false, correct, sir?

Mr. Rinaldi: Yes.

Pet. App. A24-A25.

Later in the colloquy, petitioner confirmed his counsel's on-the-record representations that they had reviewed and discussed "in depth," among other things, "the discovery provided by the Government," and "any defenses he may have" to the charges. Pet. App. A27. The court then accepted petitioner's plea. The sentencing hearing was initially scheduled for the June 24, 2002, but was repeatedly deferred.

4. a. On January 29, 2003, before sentencing, petitioner moved to withdraw his guilty plea based upon a two-prong claim of actual innocence. Pet. App. A31. Petitioner principally argued that, at the time of his plea, he was "under the impression that the IDPA only paid for orthodontic procedures on a 'fee for service' basis," meaning that it paid only for services that were "actually performed." *Id.* at A18. Under that view, an orthodontist who "submitted an invoice for services not actually performed would be committing fraud." *Id.* at

A19. Petitioner alleged that after he entered his plea, he "discovered" that he had actually submitted invoices using a bundled-fee, or flat-rate, system, thus allowing him (in his view) to receive payment regardless of whether services had actually been rendered, in which case the submission of claims for services not performed would not necessarily be fraudulent. *Ibid.* Alternatively, petitioner claimed that any mistakes he made in record-keeping and billing were the result of his newly diagnosed, but pre-existing, DSM IV condition of Adult Attention Deficit Disorder (AADD), which he alleged "prevented him from forming the requisite criminal intent at the time of the offenses." *Id.* at A31.

The district court denied petitioner's motion, concluding that his alleged "discoveries" "should have occurred a year ago before [he] took a solemn oath and testified he was guilty of the crimes charged." Pet. App. A19. With respect to the bundled-fee issue, the court held that "the information on which [petitioner] bases his argument was known at the time he entered his guilty plea," *id.* at A20, and thus did not amount to a "fair and just reason" for withdrawing the plea. In particular, the court noted that "there is no allegation that [petitioner] did not know, after practicing for over two decades, how he billed IDPA," that petitioner himself admitted that he possessed the Spinner policy memorandum "at the time he entered his plea," and that "a defendant is not entitled to withdraw his plea merely because he has reevaluated the evidence." *Id.* at A21. In short, petitioner could not "now successfully argue that a new look at evidence, which was available at the time of his guilty plea, is a 'fair and just reason' to withdraw." *Ibid.* Indeed, the court found, petitioner's motion "flies in the face of the testimony he provided at the change of plea

hearing." *Id.* at A22. And, after reviewing those statements, the court concluded that whether petitioner submitted bills using a fee-for-service or bundling-fee arrangement ultimately "makes no difference" in light of his sworn admissions that he "knowingly submitted false claims." *Id.* at A25. The court also rejected petitioner's AADD-based arguments for withdrawal. *Id.* at A26.

b. Petitioner asked the district court to reconsider the denial of his motion to withdraw the guilty plea, and the district court ordered petitioner to undergo a custodial psychological exam to gauge the veracity of his AADD claim. Pet. App. A31-32. Petitioner filed an interlocutory appeal contesting the custodial exam, and on December 1, 2003, the court of appeals reversed the order. See *United States* v. *Rinaldi*, 351 F.3d 285 (7th Cir. 2003). On remand, petitioner consented to a non-custodial psychological examination. Pet. App. A32. A series of expert witnesses submitted reports about petitioner's mental capacity to form the requisite intent to submit fraudulent bills and obstruct justice. *Ibid.*

After reviewing the reports and the entirety of the record, the district court issued an order on December 9, 2004, denying petitioner's motion to reconsider. Pet. App. A30-A47. The court held that the presence of the AADD symptoms did not deprive petitioner of the capacity to form the requisite mens rea. *Id.* at A34-A40. The court also adhered to its prior finding that the bundled-fee issue did not amount to new evidence justifying a withdrawal of the plea. *Id.* at A40-A47. Petitioner filed a motion to reconsider the denial of his motion to reconsider, which also was denied. *Id.* at A54.

5. Before sentencing, the Probation Office prepared a presentence investigation report (PSR). As relevant here, the PSR calculated a combined adjusted offense

level of 14, which included an adjustment based on the amount of loss. PSR ¶ 26; Sentencing Guidelines § 2B1.1(b)(1)(C). When combined with a criminal history category of I, petitioner's range of imprisonment under the Sentencing Guidelines was 15 to 21 months. PSR ¶ 71.

Relying on a statement of net worth executed and submitted by petitioner that demonstrated total assets exceeding $2.37 million (PSR ¶ 66), the PSR concluded that petitioner had "the ability to pay a fine." PSR ¶ 69. With an offense level of 14, the PSR noted that petitioner's fine range under the Guidelines was $4000 to $40,000, see PSR ¶ 82; Sentencing Guidelines § 5E1.2(c)(3), but that the statute authorized a maximum fine of $250,000 per count, see PSR ¶ 79; 18 U.S.C. 3571(b)(3).

6. The sentencing hearing was held over the course of three days in October 2005. Pet. App. A5. Both sides filed sentencing memoranda and, at the hearing, they "represented their evidence submitted in consideration of the motion to reconsider [petitioner's] motion to withdraw his guilty plea," including factual testimony about his "having removed records from his office after receiving the government subpoena," and expert testimony about his ability to form criminal intent. *Id.* at A5-A6. In addition, Spinner himself testified that the policy statement he had prepared was "an erroneous interpretation" of an internal manual, that it was produced "only in response to the government's discovery request," that it "was never distributed to dental providers during the period in which [petitioner] perpetrated his fraud," and that "it was disavowed by [Spinner's] superiors within a month of its being offered to the government." *Id.* at A9.

The district court concluded that the disavowed Spinner memorandum was "irrelevant" and emphasized that the bundled-fee issue was "never discussed prior to, or during, the time of the fraud." Pet. App. A10. In calculating petitioner's sentence, it adopted the recommendations of the PSR and found an offense level of 14, with a criminal history category of I, yielding an advisory-Guidelines range of 15 to 21 months of imprisonment. *Id.* at A58. After examining the factors in 18 U.S.C. 3553(a) (Supp. V 2005), the court rejected both parties' requests for departures from that range, and sentenced petitioner to 21 months of imprisonment. Pet. App. A58-A63.

The court also concluded that, "[b]ased upon [petitioner's] financial profile, it appears that he does have the ability to pay a fine," 10/18/05 Sent. Tr. 692, and it ordered petitioner to pay a "fine of $500,000, being $250,000 on each" of the two counts of conviction. Pet. App. A63-A64. The court explained that, in its view, petitioner committed "a terrible crime against the people of Illinois" by "bilk[ing] the taxpayers out of a tremendous amount of money." *Id.* at A15. At the sentencing hearing, the court expressed concern about whether the sentence would serve as an adequate deterrent, and its postsentencing opinion emphasized that, "pursuant to 18 U.S.C. 3553(a)(6), a fine within [the Guidelines range] would not adequately reflect the seriousness of the offense or provide just punishment for the offense." Pet. App. A15-A16, A64. Petitioner did not object to the fine.

7. The court of appeals affirmed. Pet. App. A1-A16. The court began by emphasizing that, because petitioner's guilty plea had been accepted by the court, "withdrawal was available only upon his showing of a

'fair and just reason' to do so." *Id.* at A6-A7 (quoting Fed. R. Crim. P. 11(d)(2)(B)). The court emphasized that "[g]uilty pleas are not to be treated as a strategic maneuver by the parties, and we presume the verity of the defendant's statements made at a Rule 11 colloquy." *Id.* at A7. The court also explained that the district court's factual findings about the adequacy of petitioner's grounds for seeking to withdraw his plea were to be examined "for clear error." *Ibid.* Applying these standards, the court found that the district court had not abused its discretion in denying petitioner's motion to withdraw his plea. *Id.* at A8 ("Given the weight of the evidence from the medical experts, we cannot find that the district court clearly erred in holding that [petitioner] failed to present credible evidence of being incapable to form the specific intent necessary to carry out [the] crimes as charged."); *id.* at A10 ("[W]e are definitively not persuaded that the district court made a mistake in its evidentiary findings on either of [petitioner's] claims to demonstrate a fair and just reason to withdraw his plea.").

The court of appeals also affirmed the imposition of the $500,000 fine.[1] The court observed that, because the fine "was more than twelve times the Guidelines suggestion, * * * the district court's reasons must be particularly compelling" to render it reasonable. Pet. App. A15; see *id.* at A13 ("The greater the divergence, the greater the justification we seek to aid our review."). The court of appeals found that the district court's oral

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[1] As an initial matter, the court of appeals rejected petitioner's argument that the district court incorrectly adopted the findings in the PSR, noting that "it is well settled Circuit case law that such findings need be made by a preponderance of the evidence only, not beyond a reasonable doubt." Pet. App. A13 n.1.

and written statements in support of the fine "evidenced [the district court's] open concern for the magnitude of [petitioner's] fraud, the difficulty encountered in ascertaining the full extent of the impact—the fault for which lay with [petitioner's] admitted obstruction of justice—and the possibility that [petitioner] may have benefitted from that obstruction." *Id.* at A16. The court thus upheld the fine as reasonable. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-16) that the court of appeals erred in concluding that the district court did not abuse its discretion in denying petitioner's motion to withdraw his guilty plea. Petitioner asserts that he is "legally innocent" (Pet. 14) of the mail-fraud charge because his claims for reimbursement were not fraudulent by virtue of his bundled-fee arrangement. The court of appeals correctly rejected that fact-bound contention, and further review of that case-specific holding is not warranted. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts.").

Petitioner does not dispute (Pet. 14) that a defendant who seeks to withdraw his guilty plea before sentencing must demonstrate a "fair and just reason." Fed. R. Crim. P. 11(d)(2)(B). And petitioner is correct (Pet. 14) that, as a general matter, the Seventh Circuit has recognized that "[b]eing legally innocent of a crime is a fair and just reason to withdraw a guilty plea," but it has also cautioned that "a blanket claim of innocence does

not mandate the court to allow the defendant to withdraw his plea" unless that claim is "supported by credible evidence." *United States* v. *Gomez-Orozco*, 188 F.3d 422, 425 (1999).

In this case, petitioner simply contends that the lower courts erred in concluding that one of the specific reasons he advanced in support of his request—the nature of his billing arrangement—was not credible. Petitioner is mistaken. Indeed, as the district court itself recognized, the nature of the billing arrangement was "irrelevant" in light of the fact that it had never been discussed before or during the fraud. Pet. App. A10. Given petitioner's sworn admissions that he knowingly submitted false claims, the undisputed fact that he had a copy of the now-repudiated Spinner memorandum before he pleaded guilty, and the fact that he discussed all possible defenses with counsel before pleading guilty, the district court acted well within its broad discretion in refusing to allow petitioner to second-guess his decision to plead guilty.

2. Petitioner contends (Pet. 16-21) that the court of appeals erred in upholding the district court's imposition of a $500,000 fine because, in petitioner's view, the imposition of a fine beyond the Guidelines range is invalid when it is "based on facts found and determined by the sentencing court," Pet. 21, rather than facts "found by the jury beyond a reasonable doubt." Pet. 18. Petitioner is incorrect.

Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), this Court held in *United States* v. *Booker*, 543 U.S. 220 (2005), that the mandatory federal sentencing guidelines implicated the rule that any fact, other than a prior conviction, necessary to support a sentence exceeding the

"maximum authorized" by a guilty plea or jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 244. By making the Sentencing Guidelines advisory rather than mandatory, however, *id.* at 245, *Booker* remedied the constitutional problem presented by the Guidelines. Now, the maximum sentence authorized by a defendant's guilty plea or the jury's verdict in federal criminal cases is the *statutory* maximum for the offense. Thus, under *Booker*, as long as the sentencing judge imposes a sentence within the statutory range, basing the sentence on judge-found facts is constitutionally permissible. Accordingly, to the extent petitioner contends that the imposition of an above-Guidelines fine on each count violated his Sixth Amendment rights, see Pet. 16-18, his argument misapprehends *Booker* and the advisory status of the Sentencing Guidelines.[2]

Petitioner notes (Pet. 18) that the court of appeals, in accordance with *Booker*, reviewed his fine for substantive reasonableness, and that, because the fine exceeded the advisory-Guidelines range, the court of appeals applied its rule of proportionality—that is, that "[t]he greater the divergence [from the Guidelines range], the greater the justification we seek to aid our review." Pet. App. A13; see Pet. 18. Petitioner, however, does not

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[2] Although petitioner is challenging the fine, rather than his term of imprisonment, because *Booker* rendered "the whole of the Guidelines advisory, it stands to reason that the Guidelines' fine requirements were likewise rendered advisory." *United States* v. *Rattoballi*, 452 F.3d 127, 139 (2d Cir. 2006); see also *United States* v. *Riley*, 493 F.3d 803, 811 (7th Cir. 2007) (affirming the district court's order imposing a fine below the advisory-Guidelines range); *United States* v. *Huber*, 404 F.3d 1047, 1063 (8th Cir. 2005) (recognizing that, in the wake of *Booker*, district courts may deviate from the Guidelines range in imposing a fine).

challenge that proportionality principle, nor does he appear to challenge the court of appeals' determination (Pet. App. A15) that the district court had given "particularly compelling" reasons for its decision to impose a fine above the advisory-Guidelines range. There is, accordingly, no reason for the Court to hold this petition pending its decision in *Gall* v. *United States*, No. 06-7949 (argued Oct. 2, 2007), in which this Court is considering a defendant's challenge to the proportionality principle. In addition to petitioner's failure to raise such a claim below or in this Court, *Gall* is unlikely to assist petitioner even if the defendant prevails in that case. Here, petitioner benefitted from the proportionality principle because it required the fine to be justified by "compelling" reasons. Any holding in *Gall* extending greater deference to a district court to sentence outside the Guidelines range, as the defendant in *Gall* argues should be the case, would not help petitioner. And the court of appeals' fact-bound ruling that the reasons for the fine were "particularly compelling" is correct and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

OCTOBER 2007